South African Law Reform Commission

DISCUSSION PAPER 166

PROJECT 151

REVIEW OF THE CRIMINAL JUSTICE SYSTEM

REFORM OF THE ARREST DISPENSATION

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INTRODUCTION

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act 19 of 1973.

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This document is available on the website of the SALRC at:
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PREFACE

This discussion paper has been prepared to elicit responses from various stakeholders and interested members of the public and to serve as a basis for the South African Law Reform Commission's (SALRC or Commission) deliberations during its consultative process on the discussion paper. Following an evaluation of the responses and any final deliberations on the matter, the SALRC will issue a report on this subject, which will be submitted to the Minister of Justice and Constitutional Development.

The views, conclusions and recommendations in this paper are not the final views of the Commission. The paper is published in full to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular area of the law with sufficient background information to enable them to place focussed submissions before the SALRC.

The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments and attributing comments to respondents unless representations are marked "Confidential". Respondents should be aware that the SALRC may, in any event, be required, under the Promotion of Access to Information Act 2 of 2000, to release information contained in representations.

Respondents are requested to submit written comments or representations on the Discussion Paper to the SALRC by no later than 31 March 2025. Comments can be sent by email or post. However, comments by email are preferred.

ABBREVIATIONS AND ACRONYMS

	Acronym	Explanations
1.	CJS	Criminal Justice System
2.	CJSR	Criminal Justice System Reform
3.	CPA	Criminal Procedure Act
4.	CPR	Criminal Procedure Reform
5.	DOJ&CD	Department of Justice and Constitutional Development
6.	ICJS	Integrated Criminal Justice Strategy for South Africa
7.	IPID	Independent Police Investigative Directorate
8.	SALRC	South African Law Reform Commission
9.	SANDF	South African National Defence Force
10.	SAPS	South African Police Service

CHAPTER 1: BACKGROUND

1. Since 1996, several programmes and initiatives have been developed to ensure the establishment and maintenance of a transformed, efficient, effective, victim-friendly and modernised criminal justice system (CJS) for South Africa. Key among these initiatives are the National Crime Prevention Strategy of 1996, as a vehicle to transform and align the CJS to the new democratic dispensation; the Seven Point Plan of 2008, which listed seven fundamental transformative measures in recognition that the CJS in South Africa was performing sub-optimally and needed to change; the National Development Plan: Vision 2030 of 2012 that outlines a roadmap for the transformation of society; and the adoption of Outcome 3 of the Medium Term Strategic Framework (2014-2019), "All People in South Africa are, and feel safe".

2. In 2017 Cabinet approved a broad framework for the development of an Integrated Criminal Justice Strategy to promote a transformed, efficient, effective and modernised integrated CJS, the result of which was the Integrated Criminal Justice Strategy for South Africa of 2019 (the ICJS). This document sets out several strategic goals of which Legislative Reforms is Strategic Goal 1. The Implementation Plan for the ICJS proposes that the overhaul of the Criminal Procedure Act 51 of 1977 (CPA) be implemented in a phased manner. However, the immediate focus should be on determining the critical weaknesses of the CPA and its Regulations.

3. On 26 August 2020, the then Minister of Justice and Correctional Services, Mr Ronald Lamola (MP), requested the Chairperson of the SALRC to include, on an urgent basis, the review of the CJS in the SALRC's research programme. Under cover of a letter dated 31 March 2021, the Minister submitted the terms of reference for the review to the Commission. The review was included in the SALRC's research programme under Project 151. In view of the urgency to reform the CPA, the SALRC is following a two-pronged approach in executing the review. First, the reform of the CPA is being dealt with in terms of an accelerated process under the Criminal Procedure Reform (CPR) Project, a sub-project of the broader Criminal Justice System Reform (CJSR) Project. Both of these processes are part of Project 151. Second, the normal SALRC processes (issue paper, discussion paper and report) will be followed for the initiation and conclusion of the broader CJSR Project.

4. As part of the accelerated process, the Department of Justice and Constitutional Development (DOJ&CD) and the SALRC hosted consultative stakeholder workshops on 23 June

2023 and 21 – 22 September 2023. The purpose of the workshops was to gather insights from stakeholders on the problems experienced in the CJS and the challenges and inadequacies that need to be addressed, as these relate to the CPA. The workshops provided an important platform for conversation and debate among the Departments and institutions in the criminal justice value chain. The outcome of the workshops assisted the SALRC in developing a framework for the scope of the review of the CJS and conceptualising the issues to be addressed. The framework outlines several thematic areas related to the pre-trial, trial and post-trial phases. These thematic areas have been identified as they relate to areas of our criminal law, particularly the CPA, that need reform. This discussion paper stems from the thematic area review of the arrest dispensation under the pre-trial phase.

5. The preliminary recommendations with respect to the issues set out in the discussion paper were presented and discussed at an International Conference titled "Strengthening the Integrated Criminal Justice System and Reviewing the Criminal Procedure Act of 1977 to ensure the Safety and Security of Our People" hosted by the DOJ&CD from 27 to 29 February 2024. Additionally, these issues were also discussed with the Legal Support division of the South African Police Service. The National Prosecuting Authority and Legal Aid South Africa gave input on some of the issues. The feedback and comments on these issues informed the current discussion paper.

CHAPTER 2: THE CONSTITUTIONALITY OF PRIVATE PERSONS EXERCISING POLICING POWERS IN LIGHT OF THE CONSTITUTIONAL MANDATE OF THE SOUTH AFRICAN POLICE SERVICE

1. Before discussing the issues related to the reform of the arrest dispensation, as outlined in Chapter 3 of this paper, it is important to briefly examine the constitutional basis for allowing individuals who are not police officials to exercise policing powers.

2. Several of the provisions of the CPA allow individuals and certain categories of persons (peace officers) who are not part of the SAPS to exercise specific powers. These are section 42, which empowers a private person to arrest a suspect without a warrant under specific circumstances;[1] section 47, which requires male inhabitants of South Africa to assist with an arrest or detention of an arrested person when requested by a police official to do so;[2] section 49, which allows a private person to use force to arrest a suspect who is resisting the arrest or to use deadly force if the suspect poses a threat of serious violence;[3] and section 334, which enables the Minister to confer specific policing functions on peace officers.[4]

3. Whether the powers mentioned in paragraph 2 above are policing powers is open to debate. The South African Police Service (SAPS) is of the view that these are policing powers. In contrast, the National Prosecuting Authority (NPA) argues that they are not policing powers but rather peace officer powers, which can also be exercised by police officials.[5] However, for the purposes of the discussion in this chapter, it will be assumed that these powers are policing powers.

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1 See paragraphs 104 – 114 under Chapter 3.

2 See paragraphs 115 – 124 under Chapter 3.

3 See paragraphs 125 – 147 under Chapter 3.

4 See paragraphs 52 – 103 under Chapter 3.

5 See paragraphs 86 – 91 under chapter 3.

4. Section 205 of the Constitution[6] provides as follows:

> (1) The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.
> (2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.
> (3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

5. Furthermore, section 199(1) of the Constitution provides for a single police service.[7]

6. It is clear from the above provisions that the Constitution gives the SAPS the mandate to execute law enforcement responsibilities. Therefore, sections 42, 47, 49 and 334 appear inconsistent with sections 205 and 199 of the Constitution. However, the Legislature clearly intended to empower the individuals specified in these sections to exercise policing powers.

7. Apart from the mentioned sections, policing powers have also been allotted to officials of other Government Departments and entities. For instance, the Immigration Act[8] allows immigration officers to arrest a foreigner without a warrant if he or she enters the country without a valid port of entry visa[9] or if he or she is an illegal foreigner.[10] Furthermore, an immigration officer may obtain a warrant to enter or search any premises for a person or thing and may seize and remove documentation from the premises.[11]

8. The Border Management Authority Act[12] provides that an officer (a member of the Border Guard) may, with or without a warrant (within the border law enforcement area or at a port of entry), search any person, goods, premises, or vehicle. They may seize anything found in that

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6 Constitution of the Republic of South Africa, 1996.

7 Section 199(1) provides that "The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution."

8 13 of 2002.

9 Section 10A(5).

10 Section 34(1).

11 Section 33(5).

12 2 of 2020.

search that may be lawfully seized and may arrest or detain any person reasonably suspected of contravening the Act.[13]

9. Furthermore, the Defence Force Act 42 of 2002 states that when the Defence Force or its members are used for a service outlined in section 201(2) of the Constitution or section 18(1)(a),(b),(c) or (d) of the Act, a member of the Defence Force involved in the execution of such service has the same powers and duties as a member of the South African Police Service.[14] Also, the Military Discipline Bill[15] empowers military police officials to arrest, without a warrant, any person who is subject to the Act.

10. Parliament, in exercising its legislative authority, must do so in accordance with and within the limits of the Constitution. Therefore, the question remains: What is the constitutional basis for authorising someone outside the police service to exercise policing powers? This was a question considered by the Khampepe Commission of Inquiry, albeit in a different context. The Khampepe Commission was established to address concerns and questions about the role and functioning of the Directorate of Special Operations (Scorpions). One of the concerns pertained to the overlapping mandates of the Scorpions and the SAPS in investigating national priority crimes, including organised crime.[16] The Scorpions had a legal mandate in terms of section 7 of the National Prosecuting Authority Act,[17] to investigate organised crime.

11. In its submission to the Khampepe Commission, the SAPS argued that the Scorpions were acting unconstitutionally when they purported to do police work, especially when it involved investigating serious organised crime. They asserted that this was because section 199(1) of the Constitution provides for a single police force.[18] Therefore, the SAPS believed that they were the only ones authorised to perform these functions.

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13 Section 18(1).

14 Section 20(1).

15 [B21-2019].

16 The Khampepe Commission of Inquiry Report at pages 6 – 7.

17 32 of 1998.

18 The Khampepe Commission of Inquiry Report at para 11.17

12. SAPS further argued that it was illogical for the then Minister of Justice and Constitutional Development, who had no line function responsibilities in respect of crime intelligence, policing and investigative functions, to oversee the investigation of national priority crimes. They, therefore, said that it was untenable for the Scorpions to perform investigative functions separate from the line of command of the then Minister of Safety and Security.[19]

13. The Khampepe Commission highlighted a legal controversy that stemmed from the interpretation of sections 205 and 199 of the Constitution read with section 7 of the National Prosecuting Authority Act. The question at hand was whether the SAPS has exclusive jurisdiction over law enforcement responsibilities to the exclusion of all others. The Commission said that this was not the case[20] and found as follows:

- There is nothing unconstitutional about the Scorpions sharing a mandate with the SAPS.[21]
- The argument that the legal mandate of the Scorpions to investigate serious organised crime is unconstitutional within the meaning of section 199(1) of the Constitution is without merit. In this regard, the Commission referred to the constitutional judgment in *Minister of Defence v Potsane*[22] where it was held that the words 'single national prosecuting authority' should not be interpreted to mean "exclusive".[23]
- There is nothing jurisprudentially unsound in conferring law enforcement responsibilities to any agency other than the SAPS. Moreover, the provisions of section 97(b)[24] of the Constitution support this conclusion.[25]

14. The above findings of the Khampepe Commission align with section 199(3) of the Constitution, which states that "Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national

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19 The Khampepe Commission of Inquiry Report at para 23.19.

20 The Khampepe Commission of Inquiry Report at para 27.3

21 The Khampepe Commission of Inquiry Report at para 12.4

22 2002 (1) SA 1 (CC), at p.14, para 26

23 The Khampepe Commission of Inquiry Report at para 12.1.

Section 97(b) provides that the President may transfer to a member of the Cabinet any power or function entrusted by legislation to another member.

25 The Khampepe Commission of Inquiry Report at para 27.5

legislation”. This means that Parliament may, through legislation, provide for additional armed services, as long as they do not constitute a police service.

15. A further question to be considered is whether there is a legitimate governmental purpose to allow persons or categories of persons outside the SAPS to exercise specific policing powers. The extension of policing powers beyond the SAPS, as provided for in sections 42, 47, 49 and 334, has been a crucial strategy employed by the government to broaden the reach of policing across the country. This approach aims to enhance public safety and security and address current societal challenges, such as the high crime rate prevalent in various parts of South Africa. The shortage of human and physical resources at several police stations significantly affects the SAPS's ability to conduct visible policing. Until all our police stations are adequately equipped with the necessary resources and sufficient manpower to combat crime and enforce laws, the government has no choice but to extend policing beyond the SAPS in order to increase the capacity of the SAPS.

CHAPTER 3: REFORM OF THE ARREST DISPENSATION

A Introduction

1. The CPA outlines the methods for securing the court attendance of accused persons. Section 38 of the CPA provides that the methods of securing the court appearance of accused persons are arrest,[26] written notice,[27] summons[28] and indictment.[29] The CPA does not specify which of the abovementioned measures should be used in certain situations, nor does it mandate the utilisation of the least intrusive measure.[30]

B Constitutional, legislative imperatives and international law obligations

2. South Africa is a party to international and regional instruments that deal with arrest and the use of force by law enforcement officials. These include the following international instruments: The Universal Declaration of Human Rights[31], the International Covenant on Civil and Political Rights,[32] and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[33] At a regional level, the African Charter on

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26 Sections 39 – 53.

27 Section 56.

28 Section 54 – 55.

29 Section 144.

30 According to section 1 of the CPA, a peace officer includes any magistrate, justice, police official and correctional official. This writing will not address arrests with a warrant because such arrests are subject to judicial oversight.

31 General Assembly Resolution 217A.

32 General Assembly resolution 2200A XXI. South Africa signed the ICCPR on 3 October 1994 and thereafter ratified it on 10 December 1998.

33 South Africa signed the ICCPR on 29 January 1993 and thereafter ratified it on 10 December 1998

Human and Peoples' Rights is of importance.[34] These instruments, among others, place an emphasis on the rights to life, freedom, liberty and security of a person and provide that no one shall be subjected to arbitrary arrest, torture or cruel, inhuman or degrading treatment or punishment.

3. The power to arrest is a crucial aspect of policing. However, it must be exercised with due regard to fundamental human rights enshrined in the Constitution.[35] Section 13(1) of the South African Police Service Act[36] requires police officials to exercise their powers and perform their duties and functions subject to the Constitution and with due regard to the fundamental rights of every person. Arresting individuals accused of committing crimes infringes on their fundamental human rights to dignity,[37] life,[38] bodily integrity, and freedom and security of person.[39] However, if an arrest complies with the requirements for a lawful arrest, it is justified and satisfies the requirements of section 36 of the Constitution.[40]

4. Arrest, as one of the methods to bring the accused to court, may occur with or without a warrant.[41] The circumstances in which a person may be arrested without a warrant by a police official are outlined in Section 40 of the CPA. When it comes to arrest without a warrant, the court in *Duncan v Minister of Law and Order*[42] has interpreted the relevant provisions of the CPA to include four requirements that must be fulfilled for the arrest to be considered lawful.[43] These requirements – also known as jurisdictional facts – are: "(i) the arrestor must be a peace officer;[44]

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34 South Africa ratified the Charter on 9 July 1996.

35 Constitution of the Republic of South Africa, 1996.

36 68 of 1995.

37 Section 10 of the Constitution of the Republic of South Africa, 1996.

38 Section 11 of the Constitution of the Republic of South Africa, 1996.

39 Section 12 of the Constitution of the Republic of South Africa, 1996.

40 Constitution of the Republic of South Africa, 1996.

41 Section 39 of the CPA. See also Du Toit et al *Commentary on the Criminal Procedure Act* (Juta loose-leaf RS 65 2020) 5-1; Tshehla B "Police officers' discretion and its (in)adequacy as a safety valve against unnecessary arrest" (2021) 46:2 *Journal for Juridical Science* 80.

42 1986 (2) SA 805 (A) par 818G-H).

43 Tshehla B (2021) 46:2 *Journal for Juridical Science* 81.

44 The arrestor must have the authority to make an arrest. This authority is derived from section 40(1) of the CPA. Furthermore, section 1 of the CPA states that a "peace officer" includes any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act,

(ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1, and (iv) the suspicion must rest on reasonable grounds"[45]. Once these jurisdictional requirements are met, section 40 of the CPA gives a police official the discretion to arrest an accused person. In conjunction with the principle that a peace officer has discretion to arrest, the four requirements for a lawful arrest are part of the existing legal principles related to the arrest of suspects.[46]

5. The courts will not interfere with a police official's decision to make an arrest as long as the discretionary power to make an arrest meets the four jurisdictional requirements outlined in the *Duncan* case.[47] This, however, does not mean that opting for arrest in a particular situation is the most appropriate option for ensuring the accused person's court appearance.[48]

6. A controversial issue in the law of arrest has been whether the *Duncan* jurisdictional facts are an adequate safety measure, considering the Constitution of the Republic of South Africa,

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1959 (Act 8 of 1959), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334 (1), any person who is a peace officer under that section.

45 Tshehla B (2021) 46:2 Journal for Juridical Science 81. Reasonable grounds/suspicion of having committed an offence means that the suspicion must have existed at the time of the intended arrest and that the offence had been committed. It can't be a vague suspicion. The suspicion must be based on what the situation is based on the facts, not what the arrestor thinks they could be. It is an objective test of reasonableness. See in this regard Lexis Nexis "When can you make a Citizen's Arrest?" 13 August 2021.

46 Arusha Gopaul (2022) at 13.

47 *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA).

48 The laws of some countries divide criminal offences into two categories, that is, arrestable and non-arrestable offences. Arrestable offences are considered more severe, requiring immediate arrest, while non-arrestable offences are less severe and immediate arrest may not be necessary. The Criminal Procedure and Evidence Code of Malawi defines an arrestable offence as an offence for which a police official may, in accordance with the First Schedule (which lists a number of arrestable offences but divides these offences into those which don't need a warrant for an arrest and those for which a warrant is needed), arrest without a warrant and defines a non-arrestable offence as an offence for which a police official requires a warrant to make an arrest. In Singapore, the police may arrest an alleged offender without a warrant for an arrestable offence**.** If the alleged offence appears to be non-arrestable, the police will need a warrant before they can make the arrest**.** In this regard, see the First Schedule of the Criminal Procedure Code of Singapore for a list of offences labelled "may arrest without warrant" or "shall not arrest without warrant".

1996.[49] This has led to the debate about the need for the fifth jurisdictional fact.[50] The fifth jurisdictional fact pertains to whether there should be an additional requirement, beyond the *Duncan* requirements, that mandates arrest only as a last resort after exhausting all other methods of ensuring the accused's presence in court, which methods are less invasive and do not involve depriving a person of his or her freedom.[51] However, the court in *Minister of Safety and Security v Sekhoto*[52] held that the fifth jurisdictional fact is not a requirement for a lawful arrest. This means that the prevention of unnecessary arrests once again depends on the proper exercise of police discretion when making an arrest.

7. The South African Police Service acknowledges the importance of using arrest as a last resort, as outlined in National Instruction 11 of 2019 on Arrest, Treatment and Transportation of an Arrested Person, which provides that although arrest is one of the methods to securing the attendance of an accused at the trial, police officials should regard it as a last resort because it constitutes one of the most drastic infringements of the rights of an individual. It further states that arrest is never an obligation, irrespective of the offence.

8. Although the National Instruction does not have the force of law,[53] it provides detailed and clear guidance to police officials on when and how to make an arrest. It provides that a police official should refrain from arresting a person if the person's court attendance may be secured through a summons or a section 56 written notice (also known as - J534). It further states that if an arrest must be made, it should preferably be done only after obtaining a warrant.

9. It is worth noting that the aim of the National Instruction is to achieve the same purpose as the fifth jurisdictional fact.[54] Regrettably, the SAPS's National Instructions lack legal force and are frequently disregarded by police officials who lack proper training. Consequently, police officials often fail to exercise their discretion in a way that would prevent unwarranted arrests.

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49 Tshehla B (2021) 46:2 *Journal for Juridical Science* 81.

50 *Louw v Minister of Safety and Security 2006 (2) SACR 178 (T) is recognised for introducing the fifth jurisdictional fact.*

51 Tshehla B (2021) 46:2 *Journal for Juridical Science* 81.

52 2011 (1) SACR 315 (SCA).

53 However, police officials who act in contravention of the National Instruction may face disciplinary action and potential criminal charges.

54 Tshehla B (2021) 46:2 *Journal for Juridical Science* 82.

C Securing the attendance of the accused in court through arrest

1 Purpose of arrest

10. Arresting persons for the purpose of ensuring their attendance in court is a common law principle that has been affirmed in case law.[55] In certain instances, however, the police may need to arrest someone without a warrant, although the purpose of the arrest is not solely to ensure the person's court appearance. These instances are set out in the National Instructions and section 41 of the CPA.

11. National Instruction 11 of 2019 on Arrest, Treatment and Transportation of an Arrested Person sets out the circumstances under which a police official may arrest a person without a warrant, although the purpose of the arrest is not to ensure the person's court appearance. These include the following:

(a) arrest for the purpose of further investigation;

(b) arrest in order to protect a suspect; and

(c) arrest in order to end an offence.

12. The power to arrest individuals in order to protect them is a crucial aspect of policing. This is particularly important in cases of mob justice, as immediate action is required to safeguard the individual being attacked by arresting him or her. In such cases, police officials do not have time to conduct an investigation before taking action. Moreover, since there may not be any evidence that the person being attacked has committed an offence, the purpose of arresting him or her cannot be to bring him or her before court.

13. It is equally important that police officials have the power to arrest persons who are in the process of committing an offence in order to stop the commission of the offence. Even though an offence is being committed, arresting the perpetrator may not be to bring the person before court.

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55 The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009) at paras 16-28; *S v Walters* 2002 2 SACR 105 (CC); Ex parte Minister of Safety and Security and Others: In Re S v Walters and Another 2002 (4) SA 613 (CC) at 640 H- 641 A; and Duncan v Minister of Law and Order 1986 (2) SA 805 (A) at 820 C-E.

For example, if a person enters private property without permission, he or she is committing the offence of trespassing. However, if it is found that the person did so unintentionally or because he or she needed help, he or she may be released without being charged.

14. Section 41 of the CPA states that a peace officer has the authority to ask for the full name and address of any person whom that peace officer has the power to arrest, or who is reasonably suspected of having committed or having attempted to commit an offence, or who may be able to give evidence about the commission or suspected commission of an offence. If the person refuses to provide his or her full name and address, the peace officer can arrest him or her without a warrant. If the person provides a name or address that the peace officer reasonably believes is false, the peace officer can also arrest him or her without a warrant and detain him or her for up to twelve hours until the information is verified.[56]

15. Unfortunately, persons are being arrested for reasons other than those set out above.[57] The Commission believes that the purpose of arrest must be set out in the CPA to prevent the misuse of the power to arrest. This will ensure that those authorised to make arrests only do so in accordance with the law and not for any other reason.[58]

16. Considering the above, the Commission recommends that section 39 should be amended as follows:

39 <u>Purpose,</u> [M]<u>m</u>anner and effect of arrest

<u>(1) A person may not be arrested –</u>

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56 In the United Kingdom, the power of summary arrest may be exercised if a police officer has reasonable grounds for believing that an arrest is necessary to determine the name or address of the suspect (if the name or address is unknown and cannot be determined easily, or if there is uncertainty about the accuracy of the name or address provided); to prevent the suspect from causing physical injury to him/herself or from suffering physical injury; to allow the prompt and effective investigation of the offence or the conduct of the suspect, and to ensure that the suspect's disappearance does not impede the prosecution of the offence. See in this regard section 24 of the Police and Criminal Evidence Act of 1984.

57 The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC) (20 April 2009). Furthermore, arrest should not be used as a form of punishment.

58 Hiemstra is of the view that an arrest under section 40(1)(b) will clearly be unlawful if the arrester deliberately exercises the authority to arrest for a purpose not intended by the legislator. See in this regard Hiemstra 8: 5-29.

> *(a)* for any reason other than ensuring his or her attendance in court or as contemplated in section 41(1); or
> *(b)* unless failure to arrest will likely result in harm to the suspect or a witness, the continuation of an offence, the interference with evidence or the undermining of the interests of justice.
> **[(1)]**(2) An arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching his body or, if the circumstances so require, by **[forcibly]** confining his body using such force as may be reasonably necessary.
> (2) The person effecting an arrest shall, at the time of effecting the arrest or immediately after effecting the arrest, inform the arrested person of the cause of the arrest or, in the case of an arrest effected by virtue of a warrant, upon demand of the person arrested hand him a copy of the warrant.
> (3) The effect of an arrest shall be that the person arrested shall be in lawful custody and that he shall be detained in custody until he is lawfully discharged or released from custody.

17. However, the SAPS does not support the insertion of the new subsection (1)(a) and (b) in section 39.[59] According to the SAPS, the CPA should not be used to address instances of abuse. They submitted that victims should make use of the remedies available to them and file complaints against police officials who fail to comply with the law, including instituting civil action against the police. SAPS further indicated that they would also arrest persons who refuse to cooperate for the purpose of ascertaining their bodily features as required by sections 36A to 37 of the CPA. They further emphasised the need for arresting a person for further investigation.

18. As stated by the SAPS, individuals who have been subject to police abuse can lay criminal charges and institute civil action against police officials who act outside the boundaries of their authority. The Commission, however, believes that for legal certainty, the CPA should outline the reasons for an arrest.

19. As sections 36A to 37 of the CPA do not empower the SAPS to arrest persons who refuse to cooperate to ascertain their bodily features, consideration should be given to amending the proposed paragraph (a) as follows: “for any reason other than ensuring his or her attendance in court or as contemplated in section 41(1); or ascertaining his or her bodily features as contemplated in sections 36A to 37 if he or she refuses to cooperate in providing his or her bodily features”.

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59 Meeting held with Legal Support (Policing and Detection Division) on 26 February 2024.

20. Given the drastic impact of an arrest on the fundamental rights of individuals, the Commission finds it unacceptable to arrest and detain persons solely for the purpose of conducting further investigations. The Commission urges the SAPS to prioritise alternative methods other than arresting persons for further investigation.

2 Arrest by police officials

21. During the 2022/2023 period, the South African Police Service (SAPS) made a total of 1,146,916 arrests.[60] The National Prosecuting Authority (NPA) prosecuted 169,800 cases in the district, regional and high courts during the same period, which resulted in 157,880 convictions.[61] Additionally, the NPA dealt with 119,583 cases through alternative dispute resolution. This included 115,592 cases of diversion for adults and informal mediation, 3,989 cases of diversion in terms of the Child Justice Act and 2 corporate ADR cases.[62]

22. There is a significant difference between the number of arrests made by the SAPS and the number of cases prosecuted by the NPA. However, this difference can be attributed to various reasons why some cases never proceed to the point of being prosecuted. These reasons include the lack of evidence against the accused, the withdrawal of charges against suspects either because of a lack of evidence or the victim decides not to pursue the case, and instances of unnecessary arrests where individuals are detained without the intention of bringing them before a court. The latter may include arresting persons to intimidate or punish them, which is not allowed in terms of our law.

23. Unnecessary arrests contribute to the problem of overcrowding. The Department of Correctional Services statistics show that as of 31 March 2023, of the total inmate population of 157,056, a total of 55,745 were remand detainees.[63] This is almost one-third of the prison population. The high number of remand detainees can be attributed to several factors. These factors include unnecessary arrests, the unaffordability of bail amounts, the absence of effective

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60 SAPS's Annual Report 2022/2023 at 14.

61 NPA's Annual Report 2022/2023 at 31.

62 Information obtained from the NPA on 23 February 2024.

63 Correctional Services Annual Report 2022/2023 at 65 and 69.

non-trial resolutions such as alternative dispute resolution mechanisms and diversion programs, and delays in the commencement and finalisation of criminal trials.

24. The overcrowding of correctional facilities is not unique to South Africa. Countries whose total prison population exceeds that of South Africa are the United States of America (1,767,200), China (1,690,000), Brazil (839,672), India (573,220), Russia (433, 006), Turkey (329,151), Thailand (274,277), Indonesia (263,940), Mexico (232,859), Iran (189,000), and the Philippines (180,826).[64] However, it is important to note that the total population of these countries is substantially higher than that of South Africa. Countries whose total prison population is lower than that of South Africa include Colombia (102,220), United Kingdom (87,841), France (75,897), Italy (61,297), Kenya (60,000), and Tanzania (32,671). The total population of these countries is close to that of South Africa.[65] Thus, comparing the total prison population of South Africa to the total prison population of the latter mentioned countries, it is apparent that South Africa has a high prison population. With the exception of Kenya and Tanzania, whose remand detainees are 41.1%[66] and 50.0%[67] of their prison population, respectively, these countries also have a lower number of remand detainees.[68]

25. One of the primary concerns associated with arrest is the potential harm to those arrested unlawfully. This harm can take many forms, ranging from emotional trauma to physical injury, and may lead to civil claims against the State. The claims against the police significantly impact the fiscus, which is already strained due to numerous pressing needs. Regrettably, police officials lack a practical procedure to ensure the presence of accused persons in court when an offence falls outside the ambit of section 56 of the CPA.

26. Gopaul is of the view that police officials lack adequate knowledge of the legal principles and aspects of an arrest without a warrant, which governs the exercise of their powers, and the

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64 Information obtained at https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=15 (Accessed on 15 May 2024).

65 Ibid.

66 As at 5 December 2022.

67 As at June 2021.

68 Ibid.

importance of the constitutional rights of suspects. Furthermore, this lack of knowledge often leads to unlawful arrest and violations of the constitutional rights of suspects.[69]

27. Police officials are under no obligation to make an arrest, irrespective of the offence committed. They must use their discretion in deciding whether an arrest is the most suitable way to secure the attendance of an accused in court. The NPA emphasised the importance for police officials to have a discretion to decide when to make an arrest, along with the associated powers of releasing suspects on warning, issuing written notices, granting bail, or further detaining them to appear in court. They submitted that if this area is to be further regulated, guidance must be provided to police officials, outlining the factors they should consider when exercising their discretion.[70]

28. Although there are internal instructions that guide police officials on how and when to exercise discretion when deciding whether to make an arrest, such are not contained in any statute. It appears reasonable and necessary to avoid making an arrest if less drastic and intrusive methods can achieve the same outcome. In this regard, Legal Aid South Africa submitted that arrest should be a measure of last resort.[71] However, the NPA is of the view that arrest as a 'measure of last resort' or 'least intrusive measure' sets the bar too high. They submitted that while the primary purpose of arrest is to ensure the appearance of the accused in court, there might be secondary purposes such as stopping or preventing violent behaviour, preventing the commission of a crime (e.g. stopping robbers on their way to commit a robbery), or preventing escalation of situations that could pose a risk to people or property. Hence, they said that to be more supportive of victims, restrictive prescriptions relating to arrest are not desirable.[72]

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69 Arusha Gopaul "The powers of a peace officer to arrest a suspect without a warrant, detain and use force – its constitutionality and consequences on the rights of a suspect" March 2022 (Thesis for the degree Doctor of Laws, UNISA).

70 Submission received from the NPA on 18 August 2023.

71 Submission received from Legal Aid South Africa on 19 March 2023.

72 Submission received from the NPA on 18 August 2023.

29. In line with the NPA's stance that the new CPA should not make "arrest" a measure of last resort but instead should list specific factors to guide police officials to determine whether an arrest is necessary, the Commission considered the following factors:

(a) The seriousness of the offence, taking into account the physical or psychological effect thereof on the victims;
(b) Whether a dangerous weapon was used to commit the offence;[73]
(c) Whether the offence was committed by the accused whilst on bail for another offence or parole;
(d) Whether the accused has a criminal record for a similar offence, particularly where a pattern of repeat offending is disclosed;
(e) The demeanour of the accused (hostile, uncooperative);
(f) Whether the accused will continue to commit offences unless he or she is arrested;
(g) Where the police official concerned has reason to believe that the accused poses a danger to any person;
(h) Whether the accused has a fixed residential address;
(i) Whether the accused is a flight risk;
(j) Whether the accused may conceal or destroy evidence;
(k) Whether the offence is gang-related;
(l) Whether the accused will attempt to influence or intimidate witnesses;
(l) Whether the accused is a child who must be dealt with in terms of Chapter 3 of the Child Justice Act 75 of 2008.

30. However, upon further consideration, the Commission decided against including these factors in the CPA. This is because police officials would not have time to consider these factors in situations where they must make decisions in the heat of the moment. Hence, it is vital to provide the police with the discretion to make split-second decisions while keeping in mind that they should be able to defend their decision to make an arrest in court. Furthermore, it is important to strike a balance between not hampering police officials from performing their duties and ensuring that only those who should be arrested are arrested.

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73 In the absence of a definition for "dangerous weapon" in the CPA, it was recommended that "dangerous weapon" be defined as follows: "Dangerous weapon means any instrument or device, which under the circumstances in which it is used, attempted to be used, or threatened to be used is readily capable of causing death or serious physical injury". In this regard, see Dangerous weapon Definition: 703 Samples | Law Insider

31. The Commission is of the view that greater judicial oversight over arrests could help address the problem of unnecessary arrest, ultimately reducing litigation against the State for unlawful arrest and detention. Hence, the scope of arrest without a warrant should be narrowed by requiring police officials to obtain a warrant of arrest unless the delay in obtaining one would defeat the purpose of the arrest. Arrest warrants issued under section 43 of the CPA are subject to judicial oversight, which is crucial in ensuring that an arrest is only made if necessary and that the rights of accused persons are safeguarded.[74]

32. The Commission recommended that the following subsection be added to section 40 of the CPA:

> (3) An arrest without a warrant referred to in subsection (1) may only be made if the peace officer effecting the arrest on reasonable grounds believes –
>
> (a) that a warrant of arrest will be issued to him or her in terms of section 43 if he or she applies for such warrant; and
>
> (b) that the delay in obtaining such warrant would defeat the object of the arrest.

33. The constitutional challenge to section 40(1)(b), currently before the High Court of Johannesburg,[75] is in line with the proposed subsection (3). In this case, the Plaintiff argues that section 40(1)(b) of the CPA infringes section 12 of the Constitution. This is because it permits arbitrary deprivations of freedom without just cause, especially considering the absence of a requirement of exigency or that any delay in obtaining a warrant under section 43 of the CPA would defeat the purpose of an arrest or unreasonably hinder the execution of a warrant. The Plaintiff further argues that the infringement is not justifiable under section 36(1) of the Constitution because there are less restrictive means to achieve the purpose of section 40 of the CPA, including by issuing an arrest warrant. Hence, the Plaintiff submitted that section 40(1)(b) is unconstitutional and invalid and therefore suggested that it should read as follows:

> whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody, but only if he on reasonable grounds believes: (i) that an arrest warrant will be issued to him under section 43 if he

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74 Magistrates are not obliged to approve the issuing of a warrant of arrest and may decline to do so if the court attendance of the accused person may be secured through a summons or written notice.

75 George Mangaliso Maduna vs Minister of Justice and Correctional Services; Minister of Police, Case No: 23323/02.

> applies for such warrant; and (ii) that the delay in obtaining such warrant would defeat the object of the arrest or would otherwise unreasonably hinder the execution of the warrant.

34. However, the SAPS does not support the inclusion of the proposed subsection (3). According to them, the high levels of crime in the country require the police to take immediate and decisive action when an offence has been committed. SAPS believes that the public expects them to arrest perpetrators as soon as possible. They are of the view that the proposed provision may encourage the community to take the law into their own hands if there is no immediate arrest after an offence is committed. SAPS cautioned that the proposed provision may lead to police officials being questioned on why they did not take a specific action instead of making an arrest. This, in their view, could make police officials hesitant to make an arrest for fear of not being able to justify their decision to arrest without a warrant.[76]

35. SAPS argued that the proposed provision should be distinguished from section 22 of the CPA, which deals with search and seizure, despite the provision's similarity to it. SAPS explained that requiring a warrant under section 22 is justified due to its impact on personal property and privacy, which the police should not unnecessarily interfere with. However, the same cannot be said about the proposed subsection (3).

36. After considering the SAPS' arguments against the proposed subsection (3) and pending the outcome of the constitutional challenge to section 40(1)(b), the Commission decided to abandon its recommendation.

37. The paragraphs under subsection (1) of section 40 outline several instances where a person may be arrested without a warrant. This subsection states as follows:

> (1) A peace officer may without warrant arrest any person-
> *(a)* who commits or attempts to commit any offence in his presence;
> *(b)* whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;
> *(c)* who has escaped or who attempts to escape from lawful custody;
> *(d)* who has in his possession any implement of housebreaking or carbreaking as contemplated in section 82 of the General Law Third Amendment Act, 1993, and

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76 Meeting held with Legal Support (Policing and Detection Division) on 26 February 2024.

who is unable to account for such possession to the satisfaction of the peace officer;[77]

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;

(f) who is found at any place by night in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence;

(g) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;

(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;

(i) who is found in any gambling house or at any gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance;

(j) who wilfully obstructs him in the execution of his duty;

(k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;

(l) who is reasonably suspected of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic;

(m) who is reasonably suspected of being a deserter from the South African National Defence Force;

(n) who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Act;

(o) who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act;

(p) who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is required to do so under an order of court or any law relating to prisons;

(q) who is reasonably suspected of having committed an act of domestic violence, as contemplated in section 1 of the Domestic Violence Act, 1998 and which constitutes an offence in terms of any law.

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[77] This paragraph appears to be broad as it is unclear what constitutes an "implement of housebreaking or carbreaking". However, this provision is a valuable crime prevention tool. In a country like South Africa, where crime is rampant, it is not advisable to define an "implement of housebreaking or carbreaking". This is because there are numerous instruments that can be used to break into a house or a car. Hence, attempting to define these instruments could result in some being overlooked, which could ultimately impede law enforcement's crime prevention efforts.

38. It is crucial to evaluate whether the instances mentioned above align with section 12 of the Constitution, which sets a high standard for restricting an individual's freedom.[78] The Commission considered each paragraph under subsection (1) to determine whether it should be retained or abolished. Below is an exposition of the Commission's views on some of these paragraphs.

39. A similar provision to paragraph (d) is included in section 82 of General Law Third Amendment Act, 129 of 1993. Section 82 states as follows:

> Any person who possesses any implement or object in respect of which there is a reasonable suspicion that it was used or is intended to be used to commit housebreaking, or to break open a motor-vehicle or to gain unlawful entry into a motor-vehicle, and who is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding three years.

40. The Commission, therefore, recommends that paragraph (d) should be repealed, and Schedule 1 of the CPA should be expanded by the inclusion of the offence referred to in section 82.

41. A similar provision to paragraph (e) is included in section 36 of General Law Amendment Act, 62 of 1955. Section 36 states as follows:

> Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.

42. The Commission, therefore, recommends that paragraph (e) should be repealed, and Schedule 1 should be expanded by the inclusion of the offence referred to in section 36. Schedule 1 currently provides for the offence of theft (whether under the common law or a statutory provision) and the offence of receiving stolen property knowing it to have been stolen. In order for an accused to be convicted of these offences, the State must be able to prove theft. For the

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[78] Section 12, among others, provides that everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.

statutory offence under section 36, the State only needs to prove a reasonable suspicion that the goods were stolen. In other words, the State does not have to prove that the goods were indeed stolen.[79]

43. The Commission believes that paragraph (f) is important for the effective execution of the powers and functions of the SAPS. However, the Commission is concerned that this paragraph gives police officials wide discretion to arrest persons who are perceived to be about to commit an offence, regardless of whether the offence is imminent or in the distant future. Hence the Commission is of the view that the scope of this provision should be limited in that there must be an immediate risk that the person is about to commit an offence. As a further safeguard, this provision should require police officials to give a suspect an opportunity to explain why he or she is found in suspicious circumstances. For example, if a police official stops a person who is running out of a yard at 3:00 in the morning and asks him where he is coming from, and the person says that he resides at the place, the police official may knock on the door to see if anyone inside the house can confirm the person's explanation. They may also check if anyone in the area has reported a crime. Therefore, a police official should not arrest a person without first conducting the necessary inquiries.

44. Furthermore, the Commission considered removing the words "by night" so that the provision also applies to a person found at any place in the mentioned circumstances. The Commission, however, realised that removing the words "by night" would broaden the application of this provision and could lead to its abuse, thereby exacerbating the issue of unwarranted arrests. This is because persons usually act under suspicious circumstances at night, hence the limitation.

45. A similar provision to paragraph (g) is included in section 2 of the Stock Theft Act, 57 of 1959. Section 2 states as follows:

> Any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence.

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[79] Mmamatshenya and Others v Minister of Police and Another (4063/2019) [2023] ZALMPPHC 7 (10 February 2023).

46. Hence, the Commission recommends that paragraph (g) should be repealed, and Schedule 1 should be expanded by the inclusion of the offence referred to in section 2. It should be noted that paragraph (g) differs from section 2 of the Stock Theft Act in that it also provides for instances where a person was in possession of stock or produce but no longer is, and the peace officer reasonably suspects that the person was in such possession. The Commission considered whether section 2 should be amended to also provide for this instance but decided against it. This is because, first, it is unclear how much time must have passed since the person last possessed the stock or produce, and second, it gives the police wide discretion to arrest a person even if no part of the stock or produce is found in the person's possession.

47. The Commission is of the view that paragraphs (h) and (i) should remain as is. Paragraph (h) is specific in scope as it is linked to the commission of an offence. Therefore, a person cannot be arrested e.g. for mere possession of liquor. Furthermore, paragraph (i) is linked to the contravention of specific laws. Thus, a person who is found in a gambling house or at a gambling table cannot be arrested unless he or she has contravened the said laws.

48. The Commission considered the possibility of repealing paragraph (m) because military police officials are able, in terms of items 13[80] and 141[81] of the First Schedule of the

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80 Item 13 provides as follows: "Any person who deserts from the South African Defence Force shall be guilty of an offence and liable on conviction, if he committed the offence while on service, to imprisonment for a period not exceeding ten years, and in any other case to imprisonment for a period not exceeding two years."

81 Item 41 provides as follows:

"(1) *(a)* Whenever a person surrenders himself to or is arrested by the chief disciplinary officer, an assistant disciplinary officer, a military policeman, a superior officer or a member of the South African Police on a charge under this Code of desertion or absence without leave, the person to whom he surrenders himself or who arrests him shall prepare and sign a certificate stating the fact of such surrender or arrest … .

(b) …

(2) *(a)* Where a person is arrested by, or surrenders himself to, a member of the South African Police on a charge of desertion or absence without leave, and such person cannot be delivered over within forty-eight hours to his commanding officer or the chief disciplinary officer or an assistant disciplinary officer, he shall without delay be brought before a magistrate of the district in which he then is and such magistrate, if satisfied after due enquiry that such person is a deserter or an illegal absentee, or that there are reasonable grounds for suspecting that such person is a deserter or an illegal absentee, may order that he be delivered over to his commanding officer or to the chief disciplinary officer or an assistant disciplinary officer and that he be committed to custody in a prison, police cell or lock-up or other place of confinement until such delivery over can be effected …"

Defence Act 44 of 1957, to arrest deserters from the South African National Defence Force (SANDF). However, they decided against repealing this provision. The Commission noted that military police officials do not have the same level of presence in public places as police officials. They are of the view that the SAPS plays a supportive role to the SANDF by arresting deserters and handing them to the SANDF.

49. The inclusion of paragraph (l) in section 40(1) is questionable because it pertains to an immigration issue and not a criminal one. However, the same argument with respect to paragraph (m) also applies to paragraph (l). That is, immigration officials typically do not have the same level of presence in public places as police officials. Hence, the SAPS provide a supportive hand to immigration officials.

50. Having considered the paragraphs under section 40(1), the Commission recommends that these paragraphs be amended as follows:

(1) A peace officer may without warrant arrest any person-

(a) who commits or attempts to commit any offence in his presence;

(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody;

(c) who has escaped or who attempts to escape from lawful custody;

[(d) who has in his possession any implement of housebreaking or carbreaking as contemplated in section 82 of the General Law Third Amendment Act, 1993, and who is unable to account for such possession to the satisfaction of the peace officer;

(e) who is found in possession of anything which the peace officer reasonably suspects to be stolen property or property dishonestly obtained, and whom the peace officer reasonably suspects of having committed an offence with respect to such thing;]

(f) who is found at any place by night in circumstances which afford reasonable grounds for believing that such person –

(i) has committed: or

(ii) is imminently about to commit an offence;

and who is unable to give a reasonable explanation for his or her presence in such circumstances;

[(g) who is reasonably suspected of being or having been in unlawful possession of stock or produce as defined in any law relating to the theft of stock or produce;]

(h) who is reasonably suspected of committing or of having committed an offence under any law governing the making, supply, possession or conveyance of intoxicating liquor or of dependence-producing drugs or the possession or disposal of arms or ammunition;

(i) who is found in any gambling house or at any gambling table in contravention of any law relating to the prevention or suppression of gambling or games of chance;
(j) who wilfully obstructs him in the execution of his duty;
(k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic;
(l) who is reasonably suspected of being a prohibited immigrant in the Republic in contravention of any law regulating entry into or residence in the Republic;
(m) who is reasonably suspected of being a deserter from the South African National Defence Force;
(n) who is reasonably suspected of having failed to observe any condition imposed in postponing the passing of sentence or in suspending the operation of any sentence under this Act;
(o) who is reasonably suspected of having failed to pay any fine or part thereof on the date fixed by order of court under this Act;
(p) who fails to surrender himself in order that he may undergo periodical imprisonment when and where he is required to do so under an order of court or any law relating to prisons;
(q) who is reasonably suspected of having committed an act of domestic violence, as contemplated in section 1 of the Domestic Violence Act, 1998 and which constitutes an offence in terms of any law.

51. As the proposed amendments to section 40(1) necessitate changes to Schedule 1, the Commission recommends amending this Schedule by adding the underlined items, as follows:

Schedule 1

(Sections 40 and 42)

[Schedule 1 substituted by s. 17 of Act 26 of 1987 (wef 24 June 1987), amended by s. 8 of Act 122 of 1998 (wef 18 July 2003), substituted by s. 68 of Act 32 of 2007 (wef 16 December 2007) and amended by s. 11 of Act 13 of 2013 (wef 29 July 2013), by s. 48 of Act 7 of 2013 (wef 9 August 2015), by s. 11 of Act 12 of 2021 (wef 5 August 2022) and by s. 24 of Act 23 of 2022 (wef 4 January 2023).]

Treason.
Sedition.
Public violence.
Murder.
Culpable homicide.
Rape or compelled rape as contemplated in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.
Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.

Any sexual offence against a child or a person who is mentally disabled as contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively.
Trafficking in persons as provided for in section 4 and involvement in the offence as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013.
Bestiality as contemplated in section 13 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.
Robbery.
Kidnapping.
Childstealing.
Assault-

(a) when a dangerous wound is inflicted;
(b) involving the infliction of grievous bodily harm; or
(c) where a person is threatened-
(i) with grievous bodily harm; or
(ii) with a firearm or dangerous weapon, as defined in section 1 of the Dangerous Weapons Act, 2013 (Act 15 of 2013).

Arson.
Malicious injury to property.
Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence.
Theft, whether under the common law or a statutory provision.
Receiving stolen property knowing it to have been stolen.
Fraud.
Forgery or uttering a forged document knowing it to have been forged.
Offences relating to the coinage.
Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.
Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody.
Offences referred to in section 4 (1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013.
Offences referred to in Chapter 2 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act 33 of 2004).
Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.
<u>An offence referred to in section 82 of General Law Third Amendment Act, 1993 (Act 129 of 1993).</u>
<u>An offence referred to in section 36 of General Law Amendment Act, 1955 (Act 62 of 1955).</u>
<u>An offence referred to in section 2 of the Stock Theft Act, 1959 (Act 57 of 1959).</u>

Question

Besides the proposed amendments to sections 39(1) and 40(1), what additional legislative and non-legislative measures could be taken to reduce instances of unnecessary or unlawful arrests?

3 Arrest by peace officers

(a) The Minister's powers conferred by section 334

52. The Minister of Justice and Constitutional Development has the power to declare by notice in the Government Gazette any category of persons, by virtue of their office, as peace officers for specific purposes.[82] This allows them to exercise the powers specified in the notice with regard to any provision of the CPA or any offence or class of offences specified in the notice.[83] Furthermore, the Minister may confer on them any power that is not conferred upon a peace officer by the CPA.[84]

53. According to Hiemstra, the categories of persons who may be declared peace officers are not limited to government officials at the national, provincial and local levels. The Minister has the power to declare employees of private bodies as peace officers. Furthermore, the State exempts itself from liability for the acts of peace officers unless they are employed by the State.[85]

54. When deciding whether to declare a specific category of persons as peace officers, the Minister takes the following considerations into account:[86]

- Whether a specific need exists to appoint persons, appointed in terms of legislation, as peace officers to enforce legislation specific to a National Department, provincial or local government or agency.
- Any potential infringements on the functions of the SAPS.
- The support the prospective category of peace officers may render to the SAPS in the investigation of specific offences.
- Civil liability that may be incurred by the employer of persons appointed as peace officers for wrongful acts.

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82 Reference to peace officer under the heading "Arrest by peace officers" should be understood to refer to a peace officer who is not a police official, unless the context indicates otherwise.

83 Section 334(1)(a).

84 Section 334(1)(b).

85 Section 334(4). See also Hiemstra *Hiemstra's Criminal Procedure* (Lexis Nexis loose-leaf February 2023) 1:33-10.

86 Briefing of the DOJ&CD to the Select Committee on Security and Justice on 7 June 2017.

(b) National and provincial legislation encroaching on the powers of the Minister conferred by section 334

55. Despite the provisions of section 334 of the CPA giving the Minister the power to declare certain categories of persons as peace officers, some departments have chosen to include the designation of specific officials as peace officers in their legislation. These include, among others,[87] section 34(3)(a) of the Private Security Industry Regulation Act[88] that states as follows:

> An inspector in respect of any provision of this or any other law applicable to security service providers is deemed to have been appointed as a peace officer by the Minister of Justice in terms of section 334 of the Criminal Procedure Act, 1977 (Act 51 of 1977), for the national territory of the Republic, and for the purpose of exercising the powers contemplated in sections 40, 41, 44, 45, 46, 47, 48, 49 and 56 of the Criminal Procedure Act, 1977.

56. Section 20(6) of the Defence Force Act[89] states as follows:

> A member of the Defence Force who exercises any power by virtue of this section must be regarded as being a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

57. Also, section 34(2) of the Civil Aviation Act[90] states as follows:

> An investigator in respect of this Act is considered to have been appointed as a peace officer by the Minister for Justice and Constitutional Development in terms of section 334 of the Criminal Procedure Act for the Republic, and for the purpose of exercising the powers contemplated in sections 40, 41, 44, 45, 46, 47, 48, 49 and 56 of the Criminal Procedure Act.

58. The departments responsible for the administration of these Acts are circumventing section 334 by giving peace officer status to their officials through their legislation. It is important to consider whether this is permissible, considering that the power to grant peace officer status to a person has been specifically given to the Minister of Justice and Constitutional Development. The DOJ&CD was faced with a similar situation where they needed to decide if the Minister should declare law enforcement inspectors of the Limpopo Gambling Board appointed in terms of the

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87 See also the Property Practitioners Act, 22 of 2019, the Consumer Protection Act, 68 of 2008, and the Game Theft Act, 105 of 1991.

88 56 of 2001.

89 42 of 2002.

90 13 of 2009.

Limpopo Gambling Act[91] to be peace officers and specify their powers by notice in the Gazette in terms of section 334. This was because section 83 of the Act stated as follows:

> A law enforcement inspector is a peace officer in terms of the Criminal Procedure Act, 1977 and has the –
> (a) powers conferred upon a police official or a peace officer in terms of Chapter 2;
> (b) power to arrest a person without a warrant in terms of section 40(1);
> (c) powers conferred upon a peace officer under section 41(1)
> (d) power to execute warrants of arrest in terms of section 44;
> (e) power to issue a written notice in terms of section 56; and
> (f) power to issue a written notice in terms of section 341,
> of the Criminal Procedure Act, 1977

59. The DOJ&CD requested a legal opinion from the Office of the Chief State Law Advisor, who advised that section 83 encroaches on the power conferred on the Minister by section 334. Furthermore, section 83 is unconstitutional in view of the limited scope of the legislative powers of a provincial legislature provided for in section 104(1)(b) of the Constitution.[92]

60. Section 334(3) of the CPA empowers the Minister to prescribe the conditions that must be met before the employer may issue a certificate of appointment as a peace officer. These conditions include that the National Commissioner of the SAPS may only confirm a person's competence[93] to exercise the powers of peace officers as outlined in the CPA after considering whether the person has any previous criminal convictions, has been declared unfit to possess a firearm, and the person's training relevant to the powers they will be exercising.[94] However, the officials of the above-mentioned departments and the Limpopo Gambling Board have not complied with these conditions. This poses a risk of appointing persons who may not be suitable for the role of peace officer.

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91 3 of 2013.

92 Legal opinion of the Chief State Law Advisor submitted to the then Director-General, Ms Sindane, on 17 November 2014.

93 All notices declaring persons as peace officers stipulate that "it must be stated in the certificate of competency … that, in the opinion of the National Commissioner of the South African Police Service, such person is competent to exercise the powers …" . However, during the SALRC's subcommittee meeting on peace officers, Maj Gen Van Rooyen indicated that the SAPS only verifies whether the person has any previous criminal convictions and has been declared unfit to possess a firearm. Hence, in practice, the SAPS does not assess a person's competency to exercise the powers of peace officers.

94 GN No. R.210 of 19 February 2002.

61. The Commission recommends that the DOJ&CD should conduct a survey of all national and provincial legislation to determine if any of these laws encroach on the power given to the Minister by section 334. This can be done by having the Director-General of the DOJ&CD send a letter to the heads of national and provincial departments, asking them whether any of the legislation they administer grants peace officer status to a person mentioned in that legislation. The purpose of conducting such a survey would be to kick-start the process of amending any such legislation to ensure that all persons who want to be appointed as peace officers follow the section 334 process. This is imperative in order to prevent discrepancies that could occur if peace officer status is granted through different pieces of legislation. Therefore, maintaining consistency and uniformity in determining who qualifies as a peace officer is very important.

62. It is uncertain how the departments responsible for administering these laws will respond to such an initiative by the DOJ&CD and whether they would be receptive to the idea of revisiting Parliament to amend their legislation. An alternative would be to allow the current dual process to continue. This means that, on the one hand, departments could continue to grant peace officer status to their officials through the legislation they administer. On the other hand, there would still be the section 334 process under which the Minister can declare certain categories of persons as peace officers. However, the first-mentioned process carries the risk of appointing individuals who may not be suitable for the role of peace officer.

(c) Exercising of plenary legislative powers by the Minister

63. SAPS argued that section 334 gives the Minister plenary legislative powers. In their view, the section allows the Minister, as part of the Executive, to delegate "policing powers" to specific categories of persons. SAPS believes that section 334 is inconsistent with the Constitution and invalid to the extent that it undermines the doctrine of separation of powers by delegating plenary legislative power to the Minister. They submitted that a Minister can only make subordinate legislation and cannot assign powers that can only be done by the Legislature. The SAPS submitted the following to support their argument:

> In the matter of *Smit v Minister of Justice and Correctional Services and Others* [2020] ZACC 29 ("Smit"), the Constitutional Court ("ConCourt") was required to consider whether section 63 of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992) ("the Drugs Act") that allowed the Minister of Justice and Correctional Services to, by notice in the Gazette, include any plant or substance in Schedule 1 or 2 of the Act, delete any substance in the Schedule or otherwise amend the Schedule, was constitutional.

It was argued that the provision in question delegated plenary legislative provisions to the Minister, which is inconsistent with the Constitution.

The ConCourt referred to the matter of *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8 to explain the difference between plenary legislative power and making subordinate legislation such as regulations:

"[35] The Legislature may not assign plenary legislative power to another body, including the power to amend the stature. Subordinate legislation is one not enacted by Parliament. In Executive Council, *this Court said:*
'There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law making. It is implicit in the power to make laws for the country, and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary power to a body'".

The ConCourt held that the delegation in section 63 conferred plenary legislative power on the Minister to amend the Schedules, which are essentially part and parcel of the Drugs Act. The Court held (in paragraph 36 of the judgment) that this *"is a complete delegation of original legislative power to the Executive and there is no clear and binding framework for the exercise of the powers. This is constitutionally impermissible".*

The undermining of the doctrine of separation of powers was also confirmed by the ConCourt with reference to its previous judgment in the matter of *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11:

"*Parliament has a very special role to play in our constitutional democracy – it is the principle legislative organ of the state. With due regard to that role, it must be free to carry out its function without interference.*
…
The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. The principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle has 'important consequences for the way in which and the institutions by which power can be exercised'."

In *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58, the ConCourt remarked as follows regarding the limitation of executive powers:

"It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."

The ConCourt in *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3 at para 49 emphasised that power may only be exercised to the extent provided for in law:

> *"The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.* ***It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'****. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power*." [Own emphasis]

64. In light of the above, the SAPS recommended repealing section 334. They proposed that the different pieces of legislation that govern peace officers should set out their powers and functions. For instance, the legislation governing Transnet should specify the powers and functions of Transnet security personnel responsible for policing train stations. This may include the power to make arrests under section 40 of the CPA, the power to request a suspect to provide the peace officer with their full name and address as provided for in section 41 of the CPA and to arrest that person if the peace officer reasonably suspects the name or address to be false. It may also include the power to issue a written notice under section 56 of the CPA. Hence, there should not be separate legislation specifically for peace officers as this would once again require the Executive to assign powers to peace officers.[95]

65. Adv JB Skosana provided the Commission with comments on the issue of peace officers. He correctly pointed out that although the definition of "peace officer" in section 1 of the CPA lists the categories of persons who are considered peace officers, section 334(1)(a) allows the Minister to expand these categories by declaring additional categories of persons as peace officers. This is tantamount to amending the definition of "peace officer", which is perceived as plenary legislative powers of Parliament.

66. The Commission does not support the SAPS's view that section 334 should be repealed. This is because the plenary legislative power exercised by the Minister lies in expanding the definition of peace officer, not in specifying their powers. It is important to note that the Minister does not expand on any of the sections in the CPA that relate to the powers of peace officers. The Minister's role is simply to determine which sections apply to a specific category of peace officers.[96]

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95 Meeting held with Legal Support (Policing and Detection Division) on 26 February 2024.

96 Submission by Dr Jean Redpath, senior researcher in the Africa Criminal Justice Reform Programme at the Dullah Omar Institute, received on 17 September 2024.

67. Furthermore, the facts of the *Smit* case, which the SAPS referred to as authority to support their argument, are relevant to the Minister's power to expand the definition of peace officer. In this case, section 63 of the Drugs and Drug Trafficking Act allowed the Minister, by notice in the Gazette, to include any plant or substance in Schedule 1 or 2 of that Act, delete any substance in the Schedule or amend the Schedule. However, section 334(1)(a) does not allow the Minister to add or detract from the sections that relate to the powers of peace officers.

68. Adv Bradley Smith, Deputy Director of Public Prosecutions, supports the Commission's interpretation of section 334. He is of the view that the Minister's authority to determine which powers under the CPA can be exercised by peace officers does not fall foul of the Constitutional Court's decision. Consequently, he disagreed with the SAPS's argument that section 334 allows the Minister to exercise plenary legislative powers by determining the powers that peace officers can exercise. However, Maj Gen Van Rooyen reiterated the view of the SAPS. She argued that the various pieces of legislation governing peace officers outline the duties of functionaries such as inspectors (who are peace officers). Therefore, she believes that the legislation should also specify the powers these functionaries require to effectively carry out their duties.[97]

69. In response to Maj Gen Van Rooyen's comments, the Commission would like to highlight that outlining the powers of peace officers in the different pieces of legislation would prevent the Minister from withdrawing these powers, as is currently the case. This would require Parliament to amend the legislation to remove specific powers, which is a time-consuming process.

70. Section 334(1)(b) allows the Minister to confer additional powers on peace officers which are not conferred on them by the CPA. It is unclear what the Legislature's intention was with this provision. It is also unclear whether the additional powers are existing powers under other legislation. If they are, this should be clearly stated. This lack of clarity raises questions about the scope and limits of the Minister's authority in exercising this power. The Commission therefore recommends that section 334(1)(b) should be amended as follows:

> The powers referred to in paragraph (a) may include any power <u>in any other law related to the work of peace officers</u> which is not conferred upon a peace officer by this Act.

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97 Ibid.

(d) Proposed amendments to the definition of peace officer and section 334

71. With reference to his comment that section 334(1)(a) of the CPA amends the definition of peace officer by allowing the Minister to expand the categories of persons who may be considered as peace officers, Adv Skosana proposed amending the definition of peace officer to encompass all relevant categories of individuals who should be considered peace officers, as was the case under the 1955 CPA.[98] This would involve amending section 334 so that the Minister can no longer expand the definition of peace officer, as is currently allowed. The Commission supports this proposal.

72. In order to identify the categories of persons who should be considered peace officers for purposes of section 334, an examination of the groups who have been declared as peace officers is necessary. The following are some of the categories of persons who have been declared peace officers under section 334 of the CPA:[99]

Government Gazette	**Category of persons**
GN 4115 in GG 49772 of 27 November 2023	Persons assigned in terms of section 7(4)(a)(iii), (iv) and (v) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), as investigators for the Investigating Directorate, established by Proclamation No. 20 of 2019.
GN R2828 in GG 47634 of 2 December 2022	Border Management Authority officials (border guards) appointed in terms of section 13(1)(b)(i) of the Border Management Authority Act 2 of 2020.
GN 2346 in GG 47197 of 5 August 2022	Security officers on the permanent establishment of Transnet SOC Limited, established in terms of section 2 of the Legal Succession to South African Transport Services Act, 9 of 1989.

98 Adv Skosana pointed out that the 1955 Act included an extensive list of persons in the definition of peace officer, among others: "(xiii)… any magistrate or justice; a sheriff or a deputy sheriff; a policeman; the superintendent, assistant superintendent, or a warder of any prison or gaol; an immigration officer; any officer appointed or assigned under any law for management of any location .. any manager or superintendent of an emergency camp established by a local authority … a chief or headman or acting chief or headman appointed in terms of any law".

99 The information has been obtained from the DOJ&CD and through desktop research. It is not an exhaustive list of all those declared as peace officers. The challenge in obtaining such a list is due to the lack of a database of all the categories of persons declared as peace officers, or persons whose declaration as peace officers has been withdrawn.

GN R499 in GG 42338 of 29 March 2019	Immigration Officers appointed in terms of section 33(2)(b) of the Immigration Act 13 of 2002.
GN 1114 in GG 41982 of 19 October 2018	Law enforcement officers appointed by a municipality.
GN R1147 in GG 40294 of 23 September 2016	Inspectors appointed in terms of section 64 of the North West Gambling Act, 2 of 2001.
GN 780 in GG 38080 of 10 October 2014	The Director of the Directorate of Animal Health of the Department of Agriculture contemplated in section 2(1) of the Animal Diseases Act, 35 of 1984. An officer under a delegation from or under the control of the Director of the Directorate of Animal Health of the Department of Agriculture as contemplated in section 2(3)(a) of the Animal Diseases Act, 35 of 1984.[100]
GN R691 in GG 37968 of 2 September 2014	Inspectors appointed in terms of section 81(1)(a) of the KwaZulu-Natal Liquor Licensing Act, 6 of 2010. Inspectors appointed in terms of section 73(4) of the Western Cape Liquor Act 4 of 2008.
GN R692 in GG 37968 of 2 September 2014	A provincial executive officer contemplated in section 3(1)(a)(iii) of the Meat Safety Act 40 of 2000. An officer under the control of a provincial officer as contemplated in section 3(1)(c) of the Meat Safety Act 40 of 2000.
GN 275 in GG 30856 of 7 March 2008	Inspectors appointed in terms of section 65 of the Limpopo Casino and Gaming Act, 4 of 1996.
GN R209 in GG 23143 of 19 February 2002	Nature conservation officers or authorised officers appointed in terms of (i) section 100 of the Nature Conservation Ordinance, 12 of 1983 (Transvaal); (ii) section 39 of the Nature Conservation Ordinance, 8 of 1969) (Free State);

[100] The Act has been repealed by the Animal Health Act, 7 of 2002.

	(iii) section 20 of the Nature Conservation Ordinance, 19 of 1974) (Cape); (iv) section 3 of the Prohibition of the Dumping of Rubbish Ordinance, 8 of 1976) (Free State); (v) section 11 (10)(a) of the Nature Conservation Ordinance, 5 of 1974) (Natal). Officers appointed in terms of section 24 of the Public Resorts Ordinance, 18 of 1969)[101]. Officers who are employed by the Western Cape, Gauteng, KwaZulu Natal, Northern Province, Northern Province, Northern Cape, North West, Eastern Cape, Mpumalanga and Free State Province and who perform security duties at provincial hospitals or related institutions. Officers appointed in terms of section 14 (1) of the National Parks Act, 57 of 1976.[102] Inspectors appointed in terms of section 98 (1) of the Telecommunications Act, 103 of 1996).[103] National road transport inspectors appointed under section 37 of the Cross Border Road Transport Act, 4 of 1998. Officers appointed under section 69 (1) (b) of the Forest Act, 122 of 1984). Sheriffs referred to in section 2 of the Sheriffs Act, 90 of 1986. Authorized officers and inspectors appointed under the Aviation Act, 74 of 1962.

101 These officers have been appointed by the Gauteng, Limpopo, Mpumalanga and North West Provinces.

102 The Act has been repealed by the National Environmental Management: Protected Areas Act, 57 of 2003.

103 The Act has been repealed by the Electronic Communications Act, 36 of 2005.

	A regional director appointed in terms of section 4 of the Minerals Act, 50 of 1991,[104] and officers in the service of the Department of Mineral and Energy Affairs in the office of such regional director who hold the position of an assistant director or an equal or a higher position. Inspectors appointed in terms of section 3(d) of the Security Officers Act, 92 of 1987.[105] Persons assigned in terms of section 7 (4)(a)(iii),(iv) and (v) of the National Prosecuting Authority Act, 32 of 1998), as investigating officers for the Special Investigating Directorate: Organised Crime and Public Safety. Safety Officers, Senior Security Officers and Safety Representatives appointed by the Airports Company South Africa Limited in terms of the Airports Company Act, 44 of 1993.

73. Adv Skosana suggested that the definition of peace officer should be limited to persons employed by the State or its entities. He noted that while the CPA does not exclude certain groups of individuals, such as those working in the private security sector,[106] there seems to be a general practice of only granting peace officer status to individuals employed by the State or its entities. On the other hand, Adv Bradley Smith, Deputy Director of Public Prosecutions, opposed the suggestion of limiting peace officer status to those employed by the State or its entities. He said that in some circumstances, individuals who are not employed by the State may still act in an official capacity.[107]

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104 The Act has been repealed by the Mineral and Petroleum Resources Development Act, 28 of 2002.

105 The Act has been repealed by the Private Security Industry Regulation Act, 56 of 2001.

106 This is evident from the provisions of section 334(4) which states that the employer of any person who becomes a peace officer would be liable for damages arising out of any act or omission by such person in the discharge of any power conferred upon that person. The section further provides that the State shall not be liable for such damages unless the State is the employer of that person. In that case, the department of State, including a provincial administration, in whose service such person is, shall be liable.

107 Submission made at a SALRC subcommittee meeting on peace officers held on 22 October 2024.

74. Having considered the above, the Commission recommends that the definition of a peace officer should be amended as follows:

> 'peace officer' includes any **[magistrate]**, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334(1)(a), **[any person who is a peace officer under that section]** a person appointed or assigned under any law for the enforcement of that law or to perform an activity under that law and a person referred to in section 334(1)(c).

75. As shown in the table above, a significant number of different categories of persons have been declared as peace officers. Attempting to include all these categories in the definition while knowing that the table does not list every category declared as peace officers to date runs the risk of unknowingly excluding some categories. Hence, the inclusion in the definition of the words "a person referred to in section 334(1)(c)", which states that a person who was a peace officer on the date of commencement of the new CPA is considered to be a peace officer and continues to exercise the powers that were conferred upon that person by the Minister.

76. Furthermore, the proposed definition of peace officer should not be viewed in isolation from the proposed section 334 in paragraph 77 below. The wording "a person appointed or assigned under any law for the enforcement of that law or to perform an activity under that law" in the definition may appear broad. However, it is important to understand that no category of persons would be able to perform any function unless the Minister determines, by notice in the Gazette, the powers they are allowed to exercise.

77. The current section 334(1) and (2) must be aligned with the proposed definition of peace officer. The Commission, therefore, recommends that section 334 should be amended as follows:

> (1) (a) The Minister may by notice in the Gazette **[declare]** determine that any person **[who, by virtue of his office, falls within any category defined in the notice, shall,]** defined as a peace officer, for purposes of this section, may, within an area specified in the notice, [**be a peace officer for the purpose of exercising]** exercise the powers defined in the notice, with reference to any provision of this Act or any offence or any class of offences likewise specified,**[the powers defined in the notice]** and may in like manner withdraw or amend any such notice.
> (b) The powers referred to in paragraph (a) may include any power in any other law related to the work of peace officers which is not conferred upon a peace officer by this Act.
> (c) A person who, on the date of commencement of this Act, was a peace officer is deemed to be a peace officer in terms of this section and continues to exercise the powers that were conferred upon that person by the Minister, which powers the Minister may in like manner withdraw or amend by notice in the Gazette.

> (2) (a) **[No]** A person who is a peace officer **[by virtue of a notice issued under subsection (1) shall]** may not exercise any power conferred upon **[him]** that person under **[that]** subsection (1)(a) unless **[he]** that person is at the time of exercising such power in possession of a certificate of appointment issued by [his] that person's employer, which certificate shall be produced on demand.
> (b) A power exercised contrary to the provisions of paragraph (a) **[shall have]** has no legal force or effect.
> (3) The Minister may by notice in the Gazette prescribe-
> (a) the conditions which **[shall]** must be complied with before a certificate of appointment may validly be issued under subsection (2)(a);
> (b) any matter which shall appear in or on such certificate of appointment in addition to any matter which the employer may include in such certificate.
> (4) Where the employer of any person who becomes a peace officer under the provisions of this section would be liable for damages arising out of any act or omission by such person in the discharge of any power conferred upon him under this section, the State shall not be liable for such damages unless the State is the employer of that person, in which event the department of State, including a provincial administration, in whose service such person is, shall be so liable.

78. The proposed amendments to section 334(1) clarify that the Minister will no longer have the authority to declare persons as peace officers. Instead, the Minister will now only be able to specify which powers of peace officers can be performed by those included in the definition. This addresses Adv Skosana's concern that the section allows the Minister to exercise plenary legislative power by expanding the definition of peace officer through the addition of new categories of persons as peace officers.

79. It is important to point out that section 334 lacks clarity on the steps to be followed once the Minister receives an application for the conferment of peace officers' powers. For example, it has become standard practice for the DOJ&CD to consult with the SAPS with respect to every application for the appointment of peace officers. However, this step is not reflected in section 334 or the regulations. Hence, it is crucial that the regulations should clearly outline the process to be followed upon receiving an application.

(e) Criteria for the appointment of peace officers

80. The Commission believes that the criteria for appointment as peace officers should be clearly outlined in the CPA. As mentioned above, several criteria must be considered before a person can be certified as competent to be appointed as a peace officer. These include checking if the individual has any previous criminal convictions,[108] has been declared unfit to possess a

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[108] If a person has a criminal record that is unrelated to the work he or she will be doing as a peace officer, for example, if the record is for a traffic violation, it should not disqualify him or her from being appointed as a peace officer.

firearm, and the person's training related to the powers they will be exercising.[109] Adv Skosana submitted that the criteria fall short in that the SAPS is only required to consider a person's training but not to certify compliance with any pre-determined training program. Furthermore, the person is not required to undergo any firearm fitness test and assessment.

81. The Commission would like to highlight that the Firearms Control Act[110] mandates that all potential firearm owners must undergo prescribed training at an accredited institution and obtain a competency certificate. In order to obtain the certificate, the individual must pass the prescribed test to demonstrate his or her knowledge of the Act,[111] as well as the prescribed training and practical test on the safe and efficient handling of firearms from an accredited institution.[112] Only after obtaining the competency certificate can an application for a firearm licence be made.[113]

82. It is crucial that the training modules for peace officers encompass a wide range of skills and knowledge to ensure that peace officers are well-prepared to handle the diverse and complex situations they may encounter in the line of duty. Numerous service providers throughout the country are accredited to provide training for peace officers in accordance with the SASSETA Unit Standards for the Training of Peace Officers. The training aims to help participants gain an understanding of the relevant sections and regulations within criminal procedure legislation pertaining to peace officers. The participants learn about the terminology and phrases used in the legislation, the duties and responsibilities of peace officers, including the power to make an arrest, the procedures for search and seizure and the giving of written notices, the rules pertaining to giving evidence, the relevant aspects of criminal law, the sections in the Bill of Rights and the different category of participants in the commission of a crime i.e, a perpetrator, accomplice and an accessory.[114]

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109 GN No. R.210 of 19 February 2002.

110 60 of 2000.

111 Section 9(2)(q).

112 Section 9(2)(r).

113 Section 6.

114 Information obtained at https://allqs.saqa.org.za/showUnitStandard. php?id=377224

83. The provision of training for peace officers by accredited service providers stems from section 24(1)(p) of the South African Police Service Act,[115] which states that the Minister of Police may make regulations regarding the attendance of training courses by police officials at institutions or centres other than those established and maintained by the SAPS. Peace officers, who are not police officials, can also access training through an accredited service provider for a fee.

84. Having considered the above, the Commission recommends that, in addition to considering whether a person has previous criminal convictions or has been declared unfit to possess a firearm as defined in the Firearms Control Act,[116] the completion of training at an institution or centre accredited to provide training for peace officers should be a requirement for issuing a certificate of appointment as a peace officer. Requiring peace officers to complete training courses will go a long way to help prevent the misuse or abuse of their powers. However, peace officers must be regulated to ensure that those who abuse their powers are brought to justice and effectively held accountable for wrongful conduct.

(f) Peace officers' powers, and oversight over the exercise of such powers

85. Peace officers exercise powers and functions similar to those of police officials. While police officials are regulated under the South African Police Service Act, 68 of 1995, which provides for their appointment, conduct and discharge, there is no comprehensive legislation that regulates the conduct of peace officers. It is the responsibility of the entity that appoints them to do so.

86. SAPS raised several concerns in respect of peace officers who are not police officials. They submitted that section 334 allows the Minister of Justice and Constitutional Development to confer what they view as "policing powers" on peace officers instead of the Minister of Police, who is the political head over policing matters.[117] This means that the Minister of Police has no say

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115 68 of 1995.

116 60 of 2000.

117 The Criminal Procedure Act came into operation on 22 July 1977, and at that time, the then Minister of Law and Order was responsible for both justice and policing matters. However, when the Minister's portfolio was changed, section 334 was not amended accordingly. Conversely, during the subcommittee meeting on peace officers held on 22 October 2024, Adv Bradley Smith stated that since the CPA falls under the mandate of the Minister of Justice and Constitutional

over the conferment of “policing powers” on peace officers or the conduct of such peace officers. Furthermore, while police officials are subject to oversight by the Independent Police Investigative Directorate (IPID), there is no similar oversight body to monitor the use of “policing powers” by peace officers.[118]

87. SAPS has a good working relationship with the Department of Justice and Constitutional Development. The Department consults them on every application for the appointment of peace officers. However, the SAPS is concerned that “policing powers” conferred on peace officers may be misused or abused, which can result in innocent individuals being ill-treated, arrested, or detained. They are of the view that such abuse of power can lead to a violation of fundamental rights, including the right to freedom, security, dignity, and privacy.

88. SAPS submitted that the employers of persons appointed as peace officers would not deal with cases of abuse of power as thoroughly and vigilantly as the National Department of Police or the IPID would handle a similar case involving police officials. According to the SAPS, peace officers who abuse “policing powers” may face less severe consequences because their employers may not fully understand the implications of their actions.[119]

89. SAPS proposed that an oversight body for peace officers should be established to deal with the abuse of powers by these officers effectively. However, they highlighted the challenge of creating an oversight body under the auspices of a national department to oversee peace officers employed by provincial and local entities. SAPS mentioned that they attempted to extend the IPID's mandate to oversee all peace officers through an amendment Bill but faced strong opposition and consequently did not pursue the amendment further.[120]

Development, the authority to determine which powers in the CPA may be exercised by the various categories of peace officers should remain with this Minister. This is because of his view that the powers outlined in the CPA should be considered peace officer powers rather than police powers.

118 Meeting held with Legal Support (Policing and Detection Division) on 26 February 2024.

119 Ibid.

120 Submission made by Maj Gen Van Rooyen at the SALRC subcommittee meeting on peace officers held on 22 October 2024.

90. Another argument against extending the IPID's mandate to regulate the conduct of peace officers is their inadequate human resources. As of 31 March 2023, the IPID had 189 investigators across all provinces responsible for investigating all registered complaints of alleged misconduct of police officials. The IPID has not met the required number of personnel, both in core and support services, to effectively and efficiently execute its legislative mandate. Limited resources make it difficult for the IPID to reach all complainants and scenes of alleged police criminality, including responding swiftly to crime scenes and investigations.[121]

91. In response to the SAPS's reference to "policing powers", Adv Bradley Smith, Deputy Director of Public Prosecutions, argued that the powers outlined in the CPA should not be considered police powers but rather powers of peace officers, which police officials can also exercise. He said that police officials have powers under the South African Police Service Act,[122] and because they are included in the definition of peace officer, they are authorised to exercise the powers of peace officers as detailed in the CPA.[123]

92. The commission considered the possibility of outlining the powers of peace officers in the new CPA. However, due to the significant variations in the training and job requirements of peace officers, it would be challenging to propose powers that are applicable to all categories of peace officers. This is especially true as the powers assigned to the different categories of peace officers by the Minister vary. For example, law enforcement officers of a municipality, who are peace officers, are only given the power to arrest without a warrant in certain situations. They have the power to arrest without a warrant under section 40(1)(a),(b),(c),(d),(e),(f),(h), and (j), but not under any of the other paragraphs of the section.[124]

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121 IPID's Annual Report 2022/2023 at 20.

122 68 of 1995.

123 Submission made at the SALRC subcommittee meeting on peace officers held on 22 October 2024.

124 Jean Redpath "Lesufi's appointment of 6,000 'crime wardens' is deeply concerning for the rule of law" *Daily Maverick* 22 July 2024. See also GN114 in Government Gazette No. 41982 of 19 October 2018, which sets out the powers of law enforcement officers appointed by municipalities.

(g) Code of conduct for peace officers

93. The Commission recommends that the new CPA should include an enabling provision for a code of conduct for peace officers who are not police officials[125] Furthermore, the Minister of Justice and Constitutional Development, in consultation with the Minister of Police, must prescribe a code of conduct for peace officers. The code of conduct must contain clear procedures for its enforcement and monitoring of its effectiveness. Importantly, the enabling provision must provide that the code of conduct is legally binding on all peace officers. This will remove any uncertainty regarding the enforceability of the code of conduct.

94. The code of conduct must be drawn up with due regard to the different categories of peace officers and the different powers conferred on them. This may involve setting different penalties for the different categories of peace officers if they contravene a provision of the code of conduct. Furthermore, the code of conduct must, at a minimum, set standards of professional conduct for the performance of peace officers' functions and duties, provide for cooperation among all role-players concerned, set out the consequences of non-compliance with the code, and establish a procedure for making and dealing with complaints alleging a contravention of the code. Moreover, publishing the proposed code of conduct for comment and consultation with all interested persons is crucial before issuing it.

95. It is important that the Minister take reasonable steps to publicise the existence and contents of the code of conduct and to inform the public on how and where to obtain a copy of it. Since the powers exercised by peace officers directly affect members of the public, it is important for this information to be readily accessible.

96. Employers of peace officers should ensure that these officers adhere to the code of conduct. The code of conduct should be given due regard in all disciplinary proceedings against peace officers. As possible abuse of powers by peace officers is a major concern, it is imperative

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125 The proposed code of conduct should not apply to police officials, as the SAPS already has a code of conduct that outlines the expected behaviour and ethical standards for police officials. In addition to the code of conduct, SAPS has also National Instructions that provide detailed guidelines on various aspects of policing. Likewise, the code of conduct should not apply to traffic officers. Metro police officials are regarded as peace officers in terms of section 64F of the South African Police Service Act, 68 of 1995. The traffic authorities overseeing metro police officials also have their own codes of conduct. Municipal police officials appointed by local municipalities also have their own codes of conduct. Furthermore, the National Commissioner of Police may, in terms of section 64L of the SAPS Act, determine national standards of policing for municipal police services

to establish and enforce measures to address any abuse of power and ensure that peace officers are held personally accountable for their actions. Victims of abuse of power by peace officers would also be able to institute civil claims against the employers of peace officers.

(h) Database of persons appointed as peace officers

97. Adv Skosana submitted that the DOJ&CD does not have a central database of categories of persons who have been declared as peace officers since the enactment of the Criminal Procedure Act in July 1977 or the advent of democracy. He also argued that the absence of a central database prevents the public from reporting instances of abuse of power or misconduct by a peace officer falling within a category of persons declared as peace officers. He added that having a database would make it easier for the public to hold the employers of peace officers accountable.

98. Adv Skosana suggested creating a database for peace officers who are declared as such under section 334 of the CPA. He proposed that the database should be integrated into an overarching criminal justice information system rather than being kept as a separate repository. He mentioned that Nigeria's Administration of Criminal Justice Act 2015 sets a helpful example for creating a criminal justice information system. The Act provides for the establishment of the Administration of Criminal Justice Monitoring Committee, which comprises different stakeholders in the criminal justice system. The Committee is responsible for collating, analysing, and publishing information in relation to the administration of the criminal justice sector in Nigeria.

99. The Commission is of the view that the database for peace officers should only include peace officers referred to in section 334 of the CPA, as well as categories of persons assigned peace officer status through other legislation. The purpose of the database should be to maintain a record of all categories of individuals who are peace officers and the specific powers they are authorised to exercise. Therefore, the personal details of the peace officers should not be included in the database. This is because including the personal details of peace officers in the database will significantly affect how the database must be maintained in order to comply with the Protection of Personal Information Act.[126]

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126 4 of 2013.

100. The Commission supports the establishment of an integrated criminal justice information system within the South African CJS. The recommendation for such a system was already made as far back as 2007 in the Review of the South African Criminal Justice System Report, which recommended a Seven-Point Plan. This plan was adopted by Cabinet in 2008 and subsequently integrated into the National Development Plan. The Seven-Point Plan contains seven transformative changes to the criminal justice system, including establishing an integrated and seamless information and technology database or system to facilitate the collection and collation of information and its analysis for the national criminal justice system, containing all relevant information.[127]

101. The Commission believes the CPA should provide the legal framework for establishing the proposed integrated criminal justice information system. The proposed system would streamline the collating of relevant information from the departments and entities in the CJS into one seamless database or system with the requisite capacity to provide the government with a credible and professional analysis of CJS data. This will enhance the overall effectiveness and efficiency of the criminal justice process.

102. The Commission is of the view that a detailed discussion of the proposed integrated criminal justice information system is beyond the scope of this paper, which primarily focuses on the reform of the arrest dispensation. Instead, the Commission recommends that a separate paper be dedicated to proposing extensive recommendations on the workings and practical implementation of such a system.

103. The separate paper should address the role of the Integrated Justice System (IJS) Programme in housing the proposed integrated criminal justice information system. The IJS has what is called the Transversal Hub. The Transversal Hub manages the related inter-departmental information exchanges across the CJS member departments and entities.[128] At present, eleven (11) government departments and entities are connected to the Transversal Hub, allowing them to exchange information electronically. The departments and entities include the South African Police Service, National Prosecuting Authority, Department of Justice and Constitutional

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127 Chapter 12 of the National Development Plan (Vision 2030) at p388.

128 DOJ&CD's Annual Report 2022/2023 at 35.

Development, Office of the Chief Justice, Department of Correctional Service, Department of Home Affairs, Department of Social Development, Legal Aid South Africa, South African Social Security Agency, Road Traffic Management Corporation, and the Private Security Industry Regulatory Authority.[129]

Questions

1. What other criteria must be included in the CPA for the appointment of peace officers, in addition to the criteria already mentioned in paragraph 84?

2. Taking into account the concerns raised with respect to the establishment of an oversight body at national level to oversee peace officers employed by provincial and local authorities or their entities, what measures should be put in place to regulate the conduct of peace officers who are not police officials or traffic officers and to prevent or reduce the misuse of their powers?

3. Do you agree with the SAPS's proposal that section 334 should be repealed and that the different pieces of legislation that govern peace officers, who are not police officials, should set out their powers and functions? Please motivate your answer.

4. Do you agree that the Minister of Justice and Constitutional Development, in consultation with the Minister of Police, must prescribe a code of conduct for peace officers? If yes, do you foresee any problems with having this code prescribed by a national Minister for peace officers employed by provincial and local governments or their entities?

[129] DOJ&CD's Annual Report 2022/2023 at 13.

4 Arrest by members of the public

(a) Arrest by private individuals (sections 42)

104. Besides empowering police officials to effect an arrest without a warrant, section 42 of the CPA also provides that a private person has the power to arrest a suspect without a warrant, but only if he or she -

(a) sees a Schedule 1 offence being committed or an attempt to commit such an offence,[130] or if he or she reasonably suspects that someone has committed such an offence;

(b) reasonably believes that a person has committed an offence and is being pursued by a person whom such private person reasonably believes has the authority to make an arrest for that offence;

(c) may by any law make an arrest in respect of an offence specified in that law;

(d) sees a person engaging in an affray.[131]

105. Furthermore, if someone is caught committing an offence on someone else's property, the owner, lawful occupier, or person in charge of the property (or someone authorised by them) can make an arrest without a warrant.[132]

106. It is worth noting that over the past few decades, the number of private security companies has increased globally. The rise in private security companies can pose a risk to the safety of civilians because they are not held to the same level of accountability as police officials.[133] Despite the enormity of the sector, private security officers perform their duties as ordinary citizens, not as peace officers under section 334 of the CPA.

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130 SAPS do not support any amendment to section 42, which would restrict a private person's ability to make an arrest to only instances where they witness the commission of an offence. This would have unintended consequences, such as preventing a private person from apprehending a suspect who has already committed a crime, such as rape or robbery, and is attempting to flee the scene.

131 Section 42(1).

132 Section 42(3)

133 Institute for Security Studies "Global lessons on regulating private security" 2016 (Accessed at Global lessons on regulating private security - ISS Africa).

107. Representations by the private security sector in the past to be accorded more powers beyond that of ordinary members of the public, for example, in effecting arrest, have not been acceded to. Reasons for denying their request appear to be attributed to the fact that the private sector does not render a public service but a business operation based on profit accumulation rather than service delivery. Their loyalty lies with the interests of their clients and is not aligned with the public interests.[134]

108. While the CPA allows a private person to arrest a suspect without a warrant, it does not specify the protocol that must be followed after the arrest. Notably, the CPA does not specify the time frame within which the person must surrender the arrested suspect to a police official, nor does it explicitly state that the person is responsible for ensuring the safety of the suspect until he or she is transferred to police custody.

109. SAPS (KZN) submitted the following "Provision and indemnity for the Minister of Safety and Security needs to be provided for in the Act for the detention of a suspect who has been arrested either by a member of the public in terms of Section 42 or by other agencies such as Metro Police or Road Traffic Inspectorate. In the short term, a charge office commander cannot be expected to know the details of the arrest of the suspect by this other agency, as the other agency is not acting within the course and scope of its duties with the Minister of Police. It is not possible for a charge office commander to assess the merits of each and every case, save for ensuring that the provisions of Section 50 of the Criminal Procedure Act are complied with and that the suspect gets to court within the quickest possible time, but no later than 48 hours after arrest. In many cases, Metro Police in KwaZulu-Natal, and in due course in other Provinces if Metro's are established elsewhere will continually make arrests and bring suspects to SAPS cells, for offences allegedly committed by them. A similar scenario occurs when a police member is called to a supermarket for, for example, shoplifting when a suspect has been arrested by the security guard. At the time that the suspect is handed over to the police member, it is not possible for the police member to have much more than what has been given in a statement by the security guard, and/or an indication that there is video footage. Although this may go towards the reasonableness of the suspicion, there is no specific provision for that short-term detention in the police cells, with the result that if the original arrest by either a private party, or metro policeman,

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134 Kole J "Exploring questions of power Peace officers and private security" SA Crime Quarterly No.61 September 2017, p21.

or security guard is found to be unlawful, then inevitably the unlawfulness continues over to the Minister of Police in regard to the continued detention. For as long as other parties are entitled to make arrests within the Republic, some provision should be made to empower the SAPS to continue with that short-term detention."

110. With reference to the comments made by the SAPS (KZN), the Commission recommends that if a metro police official or a private person (including a peace officer) arrests a suspect and hands him or her over to a police official, the police official who takes custody of the suspect should refrain from detaining the suspect without considering the circumstances surrounding the arrest. This is necessary to determine whether the arrest might be unlawful. By doing so, possible cases of unlawful arrest can be identified, ultimately reducing litigation against the State for unlawful arrest and detention. In the event that a police official determines that the arrest was likely lawful but not the most appropriate option under the circumstances, he or she may release the person with a written notice.

111. The Commission recommends that the CPA provide clarity on what is expected of a private person after making an arrest. This is crucial to ensure that the rights of arrested persons are not violated.

112. There have been calls for curtailing the power of private persons to make an arrest, especially given that they may also use force, including deadly force.[135] However, the Commission is of the view that the power of arrest by private persons should not be curtailed. This is because individuals may encounter life-threatening situations in which they must defend themselves using any means necessary. This is particularly true in a country like South Africa, which has high levels of violent crime, some of which are committed in a brutal manner.

113. Having regard to the above, the Commission recommends that section 42 should be amended as follows:

42 Arrest by private person without warrant

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135 Submitted by a delegate who attended the SALRC workshop held on 23 June 2023 to elicit comments and facilitate discussion on the thematic areas identified for the reform of the CPA.

(1) Any private person may without warrant arrest any person-
(a) who commits or attempts to commit in his presence or whom he reasonably suspects of having committed an offence referred to in Schedule 1;
(b) whom he reasonably believes to have committed any offence and to be escaping from and to be freshly pursued by a person whom such private person reasonably believes to have authority to arrest that person for that offence;
(c) whom he is by any law authorised to arrest without warrant in respect of any offence specified in that law;
(d) whom he sees engaged in an affray.
(2) Any private person who may without warrant arrest any person under subsection (1) *(a)* may forthwith pursue that person, and any other private person to whom the purpose of the pursuit has been made known, may join and assist therein.
(3) The owner, lawful occupier or person in charge of property on or in respect of which any person is found committing any offence, and any person authorised thereto by such owner, occupier or person in charge, may without warrant arrest the person so found.
(4) A private person must -
(a) ensure the safety of the arrested person while in his or her custody; and
(b) without unreasonable delay but not later than six hours after the arrest, hand over the arrested person to a police official;
(5) A police official who takes custody of a person referred to in subsection (4)(b) must, within twelve hours, consider the circumstances surrounding the arrest with the aim of determining whether the arrest may be unlawful and release the person immediately if he or she suspects that the arrest may be unlawful and, if necessary, hand to the person a written notice in terms of section 56.

114. SAPS supported the proposed amendments to section 42. They said that the proposed provision would prevent an unlawful arrest from resulting in an unlawful detention. However, they suggested that the words "but not later than six hours after the arrest" should be deleted from the proposed subsection 4(b). This is because a member of the public who has made an arrest is expected to take the suspect to the nearest police station and not do anything else after the arrest. The Commission agrees with this suggestion.

(b) Private individuals to assist in arrest when called upon (section 47)

115. Section 47 of the CPA provides that every male inhabitant in South Africa, aged between 16 and 60 years, is required to assist any police official when called upon by such police official to arrest or detain an arrested person. Failing to do so without a valid reason is a criminal offence. Furthermore, section 47 does not address the legal position of a private individual who has cooperated with a police official's request to assist in the arrest and detention of a suspect, and where it is later found that the arrest and detention were unlawful.

116. Legal Aid South Africa believes that a police official should have the authority to request assistance from any individual, including women, in an arrest situation, especially if it involves the arrest of another woman. They have also recommended that the criminalisation of refusal to comply with such a request be removed from this section, given the high incidence of violent crimes in South Africa.

117. In line with the views expressed by Legal Aid South Africa, the Commission recommends that this section be amended to allow police officials to request assistance from a woman, especially if the case involves the arrest of another woman. This is because it would be more appropriate for a woman to arrest another woman.

118. The Commission supports Legal Aid South Africa's proposal to remove the criminalisation of refusing to comply with a police official's request for assistance with an arrest. Consequently, the word "shall" in section 47(1) should be replaced with the word "may".

119. The Commission recommends that the words "inhabitant of" be deleted from section 47(1). The Commission has found no valid reason to exclude individuals who are not inhabitants of South Africa from this section.

120. The Commission recommends that section 47(1) be amended to change the minimum age from 16 to 18. This is in line with section 28(3) of the Constitution, which defines a child as a person under the age of 18 years. More importantly, section 28(2) of the Constitution states that a child's best interests are of paramount importance in every matter concerning the child. This means that the child's best interests take priority over the need of a police official to arrest and detain a suspect.

121. Furthermore, the Commission recommends removing the upper age limit of 60. It is unrealistic to expect a police official to determine whether a person he or she wants to request assistance from is below the age of 60. Police officials are likely to request assistance in instances where suspects resist arrest, which often requires quick decision-making in urgent situations. It is important to note that individuals over 60 may possess the physical and mental abilities to assist in an arrest. Hence, a police official should also be able to request assistance from a person older than 60.

122. As section 47 is silent on the protection of private persons from legal repercussions that may arise as a result of an unlawful arrest and detention, the Commission recommends that individuals who heed a police official's request to aid in the arrest and detention of a suspect be protected from liability.

123. After careful consideration, the Commission suggests amending this section as follows:

> (1) **[Every male inhabitant of the Republic]** A police official may request a person of an age not below **[sixteen and not exceeding sixty years shall, when called upon by any police official to do so,]** eighteen to assist such police official-
> *(a)* in arresting any person;
> *(b)* in detaining any person so arrested.
> **[(2) Any person who, without sufficient cause, fails to assist a police official as provided in subsection (1), shall be guilty of an offence and liable on conviction to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.]**
> (2) Any person who assists in making an arrest as contemplated in subsection (1) or who detains a person so arrested shall be exempt from liability in respect of such assistance or detention if it is later found that the arrest or detention was unlawful.

124. SAPS expressed support for the proposed amendments to section 47. They mentioned that there has never been a conviction in terms of the current subsection (2), which is an indication of the redundancy of the subsection.

5 Use of force in effecting arrest (section 49)

(a) The history of the reform of section 49

125. In declaring the imposition of capital punishment unconstitutional, the Constitutional Court in *S v Makwanyane and Another* [136] made passing reference to the need for section 49(2) to be brought in line with the constitutional emphasis on the sanctity of human life. Sami-Kistnan[137] states that if the State has no right to impose the death sentence on a convicted criminal, allowing

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136 (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) at par 140.

137 Sami-Kistnan "A critical analysis of section 49 of the Criminal Procedure Act 51 of 1977 – 'The shoot to kill debate'" (LLM Dissertation University of Pretoria, 51.

an arbitrary extra-curial discretion to kill seems perverse. A mere suspicion of crime, without any proof, cannot justify an infringement of a person's basic right – the right to life. Burring and Reddi[138] view this as an anomaly in that

> … how is it possible that it is unacceptable to kill a person who has been tried and found guilty of a serious crime against society, but yet it is acceptable to kill a person who, at the time of the attempted arrest, is still only a suspect in a criminal matter, still innocent until proven guilty, and still entitled to a fair trial to prove his guilt beyond a reasonable doubt?

126. Parliament initially enacted the amendment to section 49 in October 1998 through the Judicial Matters Second Amendment Act.[139] The Act signed by the President on 20 November 1998 and published in the Government Gazette on 11 December 1998, was intended to come into operation on a date determined by the President. The commencement date was twice proclaimed and, on both occasions, withdrawn.[140] The amendment came into effect after the Supreme Court of Appeal's decision in *Govender v Minister of Safety and Security*[141] (*Govender*) and the Constitutional Court's decision in *S v Walters*[142] (*Walters*). The reason for the 5-year delay in the implementation of the 1998 amendment was subsequently explained by the Department of Justice and Constitutional Development (DOJ&CD) as the uncertainty within the South African Police Services about the interpretation and application of the amended section 49.[143]

127. The 1998 amendment to section 49 (which came into effect in 2003) read as follows:

> (1) For the purposes of this section-
>
> (a) "arrestor" means any person authorised under this Act to arrest or to assist in arresting a suspect; and
>
> (b) "suspect" means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.

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138 Phillip Burring P., Reddi M "Section 49, lethal force and lessons from the De Menezes shooting in the United Kingdom" *De Jure* (2013) 933.

139 4 of 1998.

140 Van der Walt T. "The Use of Force in Effecting Arrest in South Africa and the 2010 Bill: a Step in the Right Direction" *PELJ PER* 2011(14) 139.

141 2001 2 SACR 197 (SCA).

142 2002 2 SACR 105 (CC).

143 Minutes dated 20 June 2012 of the briefing by the DOJ&CD to the Parliamentary Monitoring Group on the Criminal Procedure Amendment Bill [B39B-2010] 1.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds-

(a) that the force is immediately necessary for the purpose of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

(b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.

(c) that the force is immediately necessary for the purpose of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

(d) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or

(e) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.

(b) The ongoing debate

128. The decisions in *Govender* and *Walters* give context to the debate on the effects of the 2003 amendment to section 49. The Court in *Walters* established nine principles to govern the use of force in affecting an arrest. The nine guiding principles are:

(a) The purpose of arrest is to bring persons suspected of having committed offences before the court for trial.
(b) Arrest is not the only means of achieving this purpose, nor is it always the best.
(c) Arrest may never be used to punish a suspect.
(d) Where an arrest is called for, force may be used only where it is necessary in order to carry out the arrest.
(e) Where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used.

(f) In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, including the threat of violence the suspect poses to the arrestor or others and the nature and circumstances of the offence the suspect is suspected of having committed, the force being proportional in all these circumstances.
(g) Shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only.
(h) Ordinarily, such shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.
(i) These limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defence or in defence of any other person."[144]

129. In 2010, the DOJ&CD published the Criminal Procedure Amendment Bill of 2010, which sought to amend section 49 further. The preamble of the Bill stated that the objective of the Bill is to substitute and align the provisions relating to the use of force in effecting arrests with a judgment of the Constitutional Court, namely the *Walters* decision. The Bill resulted in the amendment of section 49 by the Criminal Procedure Amendment Act of 2012.[145] Sub-section (1) of section 49 was amended by the insertion of the following definition of deadly force**:**

(c) **"deadly force"** means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.

130. Subsection (2) was amended to read:

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if—
(a) the suspect poses a threat of serious violence to the arrestor or any other person; or
(b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.

144 At para 54.

145 Act 9 of 2012.

131. The principles of necessity[146] and proportionality[147] are key to section 49, which allows police officials to use force when making arrests. This section also lays out specific guidelines regarding the degree of force, including deadly force, that can be used and the situations in which such force may be used. However, if a police official uses excessive force beyond what is allowed by law, he or she can face criminal charges.[148] Additionally, section 49 applies to any person authorised under the CPA to make an arrest or to assist in arresting a suspect. This includes police officials, peace officers and private persons.

132. The amendments to section 49 in 2012 have broadened the circumstances under which police officials are authorised to use force to apprehend suspects. Besides adding the definition of 'deadly force', the amendment to section 49 brings about key changes, including removing the requirement that deadly force can only be used when it is *immediately* necessary to protect the arrestor. Furthermore, it allows the use of deadly force when the "suspect poses a threat of serious violence to the arrestor or any other person, or the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later".[149] Le Roux-Kemp and Horne[150] laments the substitution of the word "grievous" with "serious". They point out that "serious" denotes a less serious situation than "grievous".[151] Botha and Visser are of the view that this diminishes the strict criteria for the use of deadly force with which the police must comply while limiting the scope for acquiring liability.[152]

133. Legal Aid South Africa proposed that the use of force that is not proportional to the circumstances should be criminalised.

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146 This includes the duty to use non-violent means whenever possible and to use only the minimum necessary force that is reasonable in the given circumstances.

147 The use of force must be proportionate to the threat posed by a suspect to the arresting officer or other person.

148 Botha R & Visser J "Forceful arrests: an overview of section 49 of the criminal procedure act 51 of 1971 and its recent amendments" (2012) 15:2 *PELJ PER* 347.

149 Botha R & Visser J (2012) 15:2 *PELJ PER* 363.

150 Le Roux-Kemp and Horne "An analysis of the wording, interpretation and development of the provisions dealing with the use of lethal force in effecting an arrest in South African Criminal Procedure" 2011 SACJ 281.

151 Botha R & Visser J (2012) 15:2 *PELJ PER* 363.

152 Botha R & Visser J (2012) 15:2 *PELJ PER* 363.

134. SAPS suggested revising section 49 to address the issue of police officials being killed during the arrest process by introducing the following amendments to section 49:

Use of force in effecting arrest or to prevent the commission of an offence presenting imminent danger to life or the use of a limb or organ

(1) For the purposes of this section-

(a) **'arrestor'** means any person authorised under this Act to arrest or to assist in arresting a suspect;

(b) **'suspect'** means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; **[and]**

(c) **'deadly force'** means force that is likely to cause **[serious bodily harm or]** death or permanent loss or impairment of a limb or organ and includes, but is not limited to, shooting at a suspect with a firearm; and

(d) **'law enforcement office'** means any member of –

(i) the South African Police Service contemplated in section 1 of the South African Police Service Act No. 68 of 1995;

(ii) a municipal police service established under section 64A of the South African Police Service Act No. 68 of 1995 to whom the powers to arrest is assigned in terms of section 64F(2);

(iii) the South African National Defence Force contemplated in section 1 of the Defence Act No. 42 of 2002 but excluding a member of a visiting force; or

(iv) any investigator of the Independent Police Investigative Directorate, established by section 3 of the Independent Police Investigative Directorate Act No. 1 of 2011.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that, after a verbal warning had been given to this effect, an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-

(a) the suspect poses **[a threat of serious violence to]** an imminent danger to the life or permanent loss or impairment of a limb or organ of the arrestor or any other person; or

(b) the suspect is suspected on reasonable grounds of having committed a violent crime **[involving the infliction or threatened infliction of serious bodily harm]** which caused death or threatened to commit such a crime in relation to another person or which involved the infliction or threatened infliction of a dangerous wound which has, or is likely to cause permanent loss or impairment of another person's limb or organ and there are no other reasonable means of effecting the arrest, whether at that time or later.

(3) A law enforcement officer may, based on information under oath at his or her disposal or based on his or her own observations, use deadly force which reasonably appears to be necessary to prevent the commission of an offence by a suspect in possession of a firearm, explosives or a hazardous substance in circumstances presenting an imminent danger of death or permanent loss or impairment of a limb or organ of himself or herself or another person.

(4) Before a law enforcement officer considers the use of deadly force, but without endangering his or her own life or the life of another person, such law enforcement officer must, based on the circumstances of each instance, consider the use of less lethal means available to such law enforcement officer to apprehend a suspect or to prevent a suspect from committing the offence contemplated in sub-section (3).

(5) This section does not derogate from the right of any person, including a law enforcement officer, to act in self-defence in terms of the common law.

135. Legal Aid South Africa's proposal to criminalise the use of force that is not proportional to the circumstances requires further consideration. While the prevention of excessive force is important, it is crucial to weigh the potential consequences of the proposal. If implemented, this proposal could create fear among police officials, who may hesitate to use force when necessary for fear of facing criminal charges in addition to disciplinary action that may be instituted against them. Moreover, such a provision could hinder police officials from safeguarding themselves adequately.

136. As regards the definition of "deadly force", the SAPS proposes that "serious bodily harm" should be substituted with "permanent loss or impairment of a limb or organ". This proposal is based on the definition of "dangerous wound" used in the case of *Rex v Jones.*[153] In this case, the court defined a "dangerous wound" as one "which itself is likely to endanger life or the use of a limb or organ". The court in *Goliath v Minister of Police*[154] also supported this definition. It is important to note that "serious bodily harm" is not necessarily synonymous with "dangerous wound".[155] In fact, the phrase "permanent loss or impairment of a limb or organ" proposed by the SAPS is quite specific in scope. It refers only to injuries that result in the loss or impairment of a limb or organ. On the other hand, "serious bodily harm' is more comprehensive and encompasses a wide range of injuries. In a subsequent meeting with the SAPS,[156] they conceded that the definition of deadly force is not problematic in practice and should, therefore, remain as is.

137. It is important to note that only section 49 uses "serious bodily harm",[157] while several other provisions in the CPA use "grievous bodily harm".[158] Neither of these is defined in the CPA. Additionally, the 2003 amendment of section 49 used "grievous bodily harm"; however, the 2010

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153 1952 (1) SA 327 (E).

154 (CA107/2017) [2017] ZAECGHC 119.

155 In the case of *Rex v Jones* 1952 (1) SA 327 (E), the court held that the term "grievous bodily harm" was not always synonymous with the term "dangerous wound".

156 Meeting held with Legal Support (Policing and Detection Division) on 26 February 2024.

157 This phrase is only used in the definition of "deadly force" and in subsection 2(b).

158 In this regard, see sections 258(b), 259(a), 260(a), 261(a), 261A(2)(a), 266, 299A(1)(c), Schedule 2 Part II (in relation to Assault), Schedule 5 (in relation to Attempted murder), Schedule 6 (in relation to Rape and Robbery), Schedule 7 (in relation to Assault), and Schedule 8 (in relation to Assault).

amendment[159] of section 49 replaced it with "serious bodily harm".[160] As Le Roux-Kemp and Horne pointed out, "serious" denotes a less serious situation than "grievous".[161] However, in view of the Justice and Correctional Services Portfolio Committee's discussions on the amendment of section 49, there seems to have been no compelling reason for the replacement of "grievous bodily harm" with "serious bodily harm". When asked about this change by the Portfolio Committee, the DOJ&CD responded that there is not much of a difference between these phrases in law and that their dictionary meanings are essentially the same.[162]

138. It is worth considering whether to replace "serious bodily harm" in the current section 49 with "grievous bodily harm" to align it with other provisions in the CPA that use the latter phrase.

139. The Commission does not support the amendment to the definition of "deadly force" proposed by the SAPS as it does not enhance section 49.

140. The Commission supports the SAPS's suggestion that an arrestor may use deadly force only if the suspect poses an imminent/immediate danger to the life of the arrestor. This is in line with *S v Govender.*[163]

141. The Commission does not agree with the SAPS's proposal to include IPID investigators in section 49. The Commission is of the view that they are included by implication in the definition of arrestor, as they are members of the SAPS. Furthermore, the Commission does not support the inclusion of the South African National Defence Force (SANDF) in section 49, as they have a different constitutional mandate and their training differs from that of police officials. It is important to remember that the current Police Service is no longer the Police Force of the past and, therefore, operates differently from the SANDF.

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159 Criminal Procedure Amendment Bill [B39B-2010]. The President signed this Bill on 10 September 2012.

160 This is the current section 49.

161 2011 *SACJ* 281.

162 Justice and Correctional Services Portfolio Committee deliberations on the Criminal Procedure Amendment Bill [B39-2010] on 22 February 2012.

163 2001 2 SACR 197 (SCA).

142. During a subsequent meeting with the SAPS,[164] they suggested that the phrase "after a verbal warning had been given to this effect" should be removed from subsection (2). This is because police officials may not always have the opportunity to give a verbal warning, such as during an operation to counter a cash-in-transit robbery. In such cases, the police would not announce their presence by giving a verbal warning but would instead immediately take action by shooting at the robbers to protect the cash-in-transit vehicle. SAPS further proposed amending subsection 2(a) by adding "or bodily integrity" after the word "life". They explain that deadly force should also be used in instances where the bodily integrity of a person, such as victims of rape, is being violated.

143. The Commission is concerned about the application of section 49 to private individuals. It holds the view that if a person uses force, including deadly force, when making an arrest, the person will be protected by the law relating to self-defence. Hence, the Commission recommends that section 49 should not apply to private individuals.

144. The Commission believes that the use of deadly force in situations set out in subsection 2(a) is easy to justify because self-defence is recognised by the Constitution. However, subsection 2(b) could be considered as authorising extrajudicial killings. The Commission, therefore, recommends that this subsection be repealed.

145. Having considered the above, the Commission recommends that section 49 be amended as follows:

(1) For the purposes of this section-
(a) **'arrestor'** means any person, except a person referred to in section 42, authorised under this Act to arrest or to assist in arresting a suspect;
(b) **'suspect'** means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and
(c) **'deadly force'** means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.
(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-

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164 Meeting held with Legal Support (Policing and Detection Division) on 26 February 2024.

(a) the suspect poses **[a]** an immediate threat **[of serious violence]** to the life of the arrestor or any other person or an immediate threat of grievous bodily harm to the arrestor or any other person; or

[*(b)* the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.]

146. With reference to section 49 of the CPA, the SAPS argued that addressing the killing of police officials during the execution of their duties is crucial. The Commission is of the view that section 49 does not place any hindrance on the police to defend themselves. However, it is imperative that police officials receive adequate training to protect themselves, both on and off duty. The training should encompass a wide range of skills that will enable police officials to safeguard themselves in a variety of scenarios. The Professional Use of Force Policy and Guidelines for the South African Police Service of 2018 states that if police officials are properly equipped, trained and supported in learning how to intervene in situations without exposing themselves to unnecessary risks, there will be a direct benefit to police safety. It further states that training in the use of force should include a component on de-escalation tactics and how to avoid escalation.[165] It is recommended that the SAPS review their current training, both in theory and practice, to enhance the ability of police officials to ensure their safety.

147. Also, the use of force by private individuals during an arrest is problematic since they are not obliged to adhere to the above-mentioned Professional Use of Force Policy and Guidelines, which provide a comprehensive framework for the use of force by police officials. Where a private person takes it upon him or herself to arrest someone and uses force in the process, the Minister of Police cannot be held liable for any resulting damages or injuries. However, where a police official asks a private person to assist in the arrest and detention of a suspect, any damages resulting from the use of force by the private person should be the liability of the Minister of Police.

Question

Do you agree with the Commission's recommendation that section 49 should not apply to private persons who use force in the circumstances described in that section when making an arrest? Please motivate your answer.

165 See pages 10 and 15 of the Policy.

D Other means of securing the attendance of the accused in court

1 Summons (section 54)

(a) Delay in obtaining a summons

148. A prosecutor may secure the attendance of an accused for a summary trial in a lower court by drawing up the relevant charge and handing it, together with the name and, where known, the residential address, occupation and status of the accused, to the clerk of the court who must issue a summons specifying the place, date and time for the appearance of the accused in court on such charge.[166]

149. In accordance with the guidelines outlined in Police Standing Order (G) 341[167] paragraph 3(3)(a), a police official should refrain from making an arrest if the individual's court appearance can be ensured through a summons.[168] However, police officials seldom utilise this option. It is important to note that prosecutors are not always able to assist the police immediately in issuing summonses when requested, as they have a heavy workload. Furthermore, the time frame for issuing summonses depends on several factors. These include the workload of prosecutors, the complexity of the case, the amount of evidence that needs to be reviewed, the need for further investigation, and the time required for the investigating officer to conduct further investigations.[169]

150. Issuing a summons to secure the attendance of an accused person in court is ideal as it avoids unnecessary arrests that could result in unlawful arrests. Therefore, it is crucial to speed up the process of issuing summonses. In this regard, the National Prosecuting Authority should review its internal processes to ensure that dockets assigned to prosecutors for deciding whether to issue summonses do not remain with them for an excessively long period.

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166 Section 54 of the CPA.

167 This Standing Order has been replaced by National Instruction 11 of 2019 on Arrest, Treatment and Transportation of an Arrested Person.

168 See also Du Toit 6-1.

169 Input received from Dr Broughton at the project team meeting held on 30 June 2023. Dr Broughton is a Senior State Advocate at the Office of the NDPP.

(b) Electronic serving of summons and witness subpoena

151. Section 54 of the CPA deals with summonses for lower court proceedings, while section 144 of the CPA deals with indictments for high court proceedings. Both documents are usually served by the sheriff,[170] by delivering it to the accused personally. If the accused cannot be found, the documents must be delivered at his or her residence or place of employment or business to a person apparently over the age of sixteen years and apparently residing or employed there. Furthermore, a magistrate or regional magistrate can hand the indictment to the accused when committing him or her to the superior court.[171] Likewise, the sheriff usually serves a subpoena requesting a witness to provide a court with information or documents or to testify in criminal proceedings.[172] Police officials can also serve summonses and subpoenas in terms of section 329 of the CPA.[173]

152. The NPA highlighted the need to serve summonses as well as witness subpoenas electronically.[174] The Commission endorses this, considering the significant technological advancements in recent years. Hence, the law should evolve to keep current with the needs of society. The Commission is of the view that electronic service of summonses and subpoenas should be the exception to personal service of such documents and should only be permitted under specific circumstances. Hence, the Commission recommends that section 54 of the CPA be amended to allow for the service of a summons by electronic mail or facsimile transmission. The section should provide that a summons served in this manner has the same force and effect as a summons served in person, provided that the person identified in the summons acknowledges to the sender of the electronic mail or facsimile transmission that he or she received the summons and identifies himself or herself using his or her identification card or driver's license card. Section 144 should likewise be amended.[175]

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170 Appointed in terms of section 2 read with section 64 of the Sheriffs Act 90 of 1986.

171 Section 54(2) and 144(4)(a) of the CPA. See also Rule 54(4) of the Uniform Rules of Court.

172 Section 180 of the CPA. See also Rule 64 of the Magistrates' Courts Rules and Rule 54(6)-(8) of the Uniform Rules of Court.

173 See also section 15 of the Magistrates' Courts Act, 32 of 1944.

174 Comments received from Adv Jannie Schutte, senior state advocate at the NPA (NPS: Operations) on 23 February 2024.

175 Part 2 of Chapter III of the Electronic Communications and Transactions Act, 25 of 2002, applies to electronic communications.

2 Written notice to appear in court (section 56)

153. Section 56 of the CPA provides for a written notice to appear in court. In terms of this section, if a police official (including persons declared as peace officers in terms of section 334 of the CPA) on reasonable grounds believes that a magistrate's court will not impose on an accused a fine exceeding five thousand rand (R5000),[176] such police official may hand to the accused a written notice (J534). This notice must specify the name, the residential address and the occupation or status of the accused and call upon the accused to appear at a place, date and time to answer a charge of having committed the offence in question.[177] The notice must also state that the accused may admit his or her guilt and pay a stipulated fine without appearing in court.[178] The police official must immediately send a duplicate original of the written notice to the clerk of the court that has jurisdiction.[179]

154. The written notice procedure is meant for minor offences and is issued and served by police officials without involving a prosecutor or clerk of the court.[180] Providing a written notice to a suspect eliminates the risk of making an unlawful arrest. However, it is common for police officials not to have the required paperwork readily available to issue a notice on the spot.[181] Hence, a police official may arrest a suspect and take him or her to the police station to issue the notice.[182] This poses a problem as it could lead to an unlawful arrest. SAPS submitted that requiring police officials to carry written notices (J534) on their person, like traffic officers, should consider the cost implications and practicalities. Unlike traffic officers, there are far more police officials, making it impractical to procure the number of J534 books required for all operational police officials.

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176 This amount is determined by the Minister from time to time by notice in the *Gazette.*

177 Section 56(1)(a)-(b).

178 Section 57(1)(b).

179 Section 56(3).

180 Du Toit 7-1 and 7-2.

181 Information obtained from Captain Sarah Prinsloo, Principal Communication Officer: SAPS Gert Sibande District (37 police stations); see also *Minister of Safety and Security v Kleinhans* 2014(1) SACR 613 (WCC) where the officer had to arrest the accused to take him to the police station so that a section 56 notice could be issued.

182 Du Toit 7-2.

155. The NPA recommended expanding the use of written notices to cover more offences. They further pointed out that the SAPS members do not have devices on their person to capture details of suspects or verify their identity. Electronic systems for these purposes are only available at police stations. This means suspects must be taken to a police station for processing, biometric identification, and recording.

156. As police officials and those declared as peace officers in terms of section 334 can issue the section 56 written notice without the assistance of a prosecutor, it is worth considering amending this provision to broaden its reach. The following options should be considered.

157. With reference to section 56(1) which provides for the imposition of a fine, the Commission recommends amending this section to provide that the amount of the fine be reviewed every five years. Reviewing this amount regularly will bring more offences within the ambit of section 56. It is worth noting that the last review of the amount occurred in 2013.[183]

158. Although section 56 could be amended to broaden the offences for which a written notice can be issued, the arrest of persons without a warrant for certain offences under section 40(1) is a problem. Section 40(1)(b) provides that a police official (and peace officers) may arrest any person whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody. Schedule 1 contains the following offences:

(a) Treason
(b) Sedition
(c) Public violence
(d) Murder
(e) Culpable homicide
(f) Rape or compelled rape
(g) Sexual assault, compelled sexual assault or compelled self-sexual assault
(h) Any sexual offence against a child or a person who is mentally disabled
(i) Trafficking in persons
(j) Bestiality
(k) Robbery
(l) Kidnapping
(m) Child stealing
(n) Assault
    (i) when a dangerous wound is inflicted;
    (ii) involving the infliction of grievous bodily harm; or
    (iii) where a person is threatened

183 GN R62 in Government Gazette No. 36111 of 30 January 2013.

- with grievous bodily harm; or
- with a firearm or dangerous weapon, as defined in section 1 of the Dangerous Weap ons Act, 2013 (Act 15 of 2013).

(iv) Arson

(o) Malicious injury to property
(p) Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence
(q) Theft, whether under the common law or a statutory provision
(r) Receiving stolen property knowing it to have been stolen
(s) Fraud
(t) Forgery or uttering a forged document knowing it to have been forged
(u) Offences relating to the coinage
(v) Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine
(w) Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this Schedule or is in such custody in respect of the offence of escaping from lawful custody
(x) Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule

159. It is recommended that section 40(1)(b) be amended to exclude from arrest the offences of theft, fraud, forgery or uttering a forged document knowing it to have been forged, and offences relating to coinage, as contained in Schedule 1. This is because these offences do not involve physical violence. However, a police official should be able to arrest a person for any of these offences if he or she-

(a) reasonably believes that the person may not attend the trial and is likely to flee, conceal or destroy evidence;

(b) does not know and cannot easily ascertain the person's name and address; or

(c) has reasonable grounds for doubting whether a name and address given by the person as his name is his real name or address;

160. It is further recommended that the offences excluded from section 40(1) should be incorporated under section 56(1) to broaden the offences for which a written notice can be issued.

161. Section 56(2) provides that if the suspect is in custody, he or she must be released immediately upon receiving a written notice. However, the drafters of this provision did not consider the possibility that the same suspect may be in custody for another offence. Hence, the Commission recommends that this provision be amended to make it clear that the release of the suspect is contingent upon him or her not being held for any other offence.

162. It is important to consider whether it should be made a criminal offence if a person fails to appear in court as directed in the section 56 written notice. This would be similar to section 55(1) of the CPA, which states that an accused person who fails to appear in court after being summoned is guilty of an offence. This section further provides an accused with the option to avoid arrest by being released on a warning under section 72 of the CPA by a police official tasked with arresting the accused if it appears to such police official that the accused will appear in court in accordance with the warning. On the other hand, individuals who receive a written notice and fail to appear in court on the specified date and time may be arrested.[184]

163. With regard to the SAPS's comment that it would not be cost-effective or practical for police officials to carry the section 56 written notice (J534) on their person, the Commission recommends that the new CPA should provide that if a police official requests a suspect to accompany him or her to a police station to receive the notice and the suspect complies or if the police official arrests the suspect for this purpose, this action should not be construed as an arrest.

164. Having regard to the above arguments, the Commission recommends that section 56 be amended as follows:

> **56 Written notice as method of securing attendance of [accused] suspect in magistrate's court**
>
> (1) If **[an accused]** a suspect is alleged to have committed-
> (a) an offence and a peace officer on reasonable grounds believes that a magistrate's court, on convicting such **[accused]** suspect of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette***[,]**;
> (b) the offence of theft, fraud, forgery or uttering a forged document knowing it to have been forged and offences related to coinage referred to in Schedule 1;
> such peace officer may, whether or not the **[accused]** suspect is in custody, hand to the **[accused]** suspect a written notice which shall-
> **[*(a)*]** (i) specify the name, the residential address and the occupation or status of the **[accused]** suspect;
> **[*(b)*]** (ii) call upon the **[accused]** suspect to appear at a place and on a date and at a time specified in the written notice to answer a charge of having committed the offence in question;
> **[*(c)*]** (iii) contain an endorsement in terms of section 57 that the accused may admit his guilt in respect of the offence in question and that he may pay a stipulated fine in respect thereof without appearing in court; and

184 This is clearly stated in the written notice template.

[*(d)*] (iv) contain a certificate under the hand of the peace officer that he has handed the original of such written notice to the accused and that he has explained to the accused the import thereof.

(1A) The Minister must review, from time to time, the amount referred to in subsection (1)*(a)*.

(1B) The review under subsection (1A) shall be-

(a) in the case of the first review, not later than one year after the enactment of this Act; and

(b) in the case of any subsequent review, not later than five years after the preceding review.

(2) If the **[accused]** suspect is in custody, the effect of a written notice handed to him under subsection (1) shall be that he be released forthwith from custody, unless otherwise detained in connection with another case.

(3) The peace officer shall forthwith forward a duplicate original of the written notice to the clerk of the court which has jurisdiction.

(4) The mere production to the court of the duplicate original referred to in subsection (3) shall be *prima facie* proof of the issue of the original thereof to the accused and that such original was handed to the accused.

(5) The provisions of section 55 shall *mutatis mutandis* apply with reference to a written notice handed to an accused under subsection (1)

(6) Despite the provisions of section 40(1)(b), a peace officer may without warrant arrest any person whom he or she reasonably suspects of having committed an offence referred to in subsection 1(b) if he or she-

(a) reasonably believes that the person may not attend the trial and is likely to flee, conceal or destroy evidence;

(b) does not know and cannot easily ascertain the person's name and address; or

(c) has reasonable grounds for doubting whether a name and address given by the person as his name is his real name or address;

(7) Where a peace officer, for the purpose of handing to a suspect a written notice as contemplated in section 56 –

(a) requests the suspect to accompany him or her to a police station, and the suspect complies;

(b) arrest the suspect, if necessary;

such action or arrest shall not be construed as unlawful.

165. SAPS supports the proposal that more offences be included within the ambit of section 56 but cautions against using the section 56 notice for cases similar to those mentioned in the State Capture Commission Report.

166. During the break-away session on the reform of the arrest dispensation,[185] SAPS stated that there is no uniform list of offences for which a section 56 written notice can be given to a suspect. Hence, police officials are uncertain about the offences for which they can give a written notice. SAPS suggested that the Chief Justice should provide a uniform list of offences for which

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185 The break-away session was part of the International Conference on the Integrated Criminal Justice System and the Review of the Criminal Procedure Act, 51 of 1977, held on 27-29 February 2024.

a written notice can be given. However, the Commission is of the view that such action by the Chief Justice would violate the separation of powers. Hence, the Commission recommends that the Minister of Justice and Constitutional Development should publish the list of offences by notice in the Gazette instead of the Chief Justice providing such a list. The Commission therefore recommends that section 56 be amended by the addition of the following provision at the end of the proposed section 56:

> (8) The Minister shall publish a list of offences for which a suspect may be given a written notice in terms of this section and any amendment thereof by notice in the Gazette.

Questions

Besides the offence of theft, fraud, forgery or uttering a forged document knowing it to have been forged and offences related to coinage referred to in Schedule 1, are there any other offences that should be included under the proposed section 56(1)?

Persons who receive a written notice and fail to appear in court on the specified date and time may be arrested in order to secure their attendance. However, should it be made a criminal offence if a person fails to appear in court as directed in the section 56 written notice?

E Additional Issues

1 Broadening the definition of "aggravating circumstances"

167. At the SALRC workshop[186] held on 23 June 2023, a proposal was made to broaden the definition of "aggravating circumstances" to include imitation firearms and toy guns. SAPS and the NPA expressed support for this proposal. The Commission considers it important to amend the definition as suggested because the emotional impact on victims of robbery is the same

[186] This workshop was held by the South African Law Reform Commission to elicit comments and facilitate discussion on the thematic areas identified for the reform of the CPA.

regardless of whether the perpetrator used a real firearm, an imitation firearm or a toy gun to commit the crime.

168. The Commission recommends that the definition be amended as follows:

"aggravating circumstances" in relation to robbery or attempted robbery, means-

(i) The wielding of a firearm, including an imitation or toy firearm or any other dangerous weapon;

(ii) The infliction of grievous bodily harm; or

(iii) A threat to inflict grievous bodily harm

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.

169. The proposed definition was discussed with the SAPS, and they have confirmed that they agree with the amendment.[187]

2 Procedure after arrest: The 48-hour rule

170. Section 50(1)(a) of the Criminal Procedure Act[188] (CPA) states that an arrested person must be taken to a police station or another specified location mentioned in the warrant of arrest as soon as possible. In accordance with section 35(1)(d) of the Constitution,[189] an arrested person must be brought before a lower court as soon as reasonably possible but not later than 48 hours after his or her arrest.[190] Thus, once it is reasonably possible to bring an arrested person before court before the expiry of the 48-hour period, it must be done.[191] However, this does not always happen in practice as some police officials detain arrested persons for the entire 48-hour period before bringing them to court. This practice was criticised in the Supreme Court of Appeal in *Mashilo and Another v Prinsloo*,[192] where the court said the following:

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187 Meeting held with Legal Support (Policing and Detection Division) on 26 February 2024.

188 51 of 1977.

189 Constitution of the Republic of South Africa, 1996.

190 Section 50(1)(c) of the CPA.

191 Du Toit et al *Commentary on the Criminal Procedure Act* (Juta loose-leaf RS 65 2020) 5-44A.

192 2013 (2) SACR 648 (SCA).

> The outer limit of 48 hours envisaged in the subsection does not, without more, entitle a policeman to detain someone for that entire period without bringing him to court if it could be done earlier. The subsection obliges police authorities to bring someone before court as soon as is reasonably possible. This is so, whether or not the 48 hour expires before or during the weekend.[193]

171. According to Du Toit, if the police official concerned fails to bring the arrested person before court, the arrested person's further detention becomes unlawful from the moment it allegedly became reasonably possible to bring him or her before court before the expiry of the prescribed period. Hence, in a delictual claim for damages, the plaintiff (arrestee) only needs to allege that it was reasonably possible to bring him or her before court before the 48-hour period expired.[194]

172. If the 48-hour period expires outside of ordinary court hours or on a day that is not an ordinary court day, the accused must be brought before a lower court no later than the end of the first court day.[195] Hiemstra explains the operation of the 48-hour rule through the following scenario. If a person is arrested at 18h00 on a Saturday, the 48-hour period will expire at 18h00 on a Monday. This means that the first court day after the expiry of the 48-hour period is Tuesday, and the person must be brought before court before the end of the Tuesday.[196] However, this must be done if it is reasonably possible to bring the arrested person before court on the Monday. Failure to do so would result in the unlawful detention of the arrested person.

173. Section 50(1)(c) is clear that a police official is not required to detain an arrested person for the full 48 hours. Instead, he or she must bring the person before court as soon as reasonably possible. It is crucial that this information is communicated to police officials during their training and that disciplinary action be taken against police officials who fail to comply with this section.

174. SAPS pointed out that there may be practical reasons for the delay in bringing a person before court. This could be because of the need to first process all individuals who are required

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193 Paragraph 16.

194 Du Toit 5-44A.

195 Section 50(1)(d)(i) of the CPA.

196 Hiemstra *Hiemstra's Criminal Procedure* (Lexis Nexis loose-leaf February 2023) 8: 5-30.

to appear in court on a given day or because of a full court roll that prevents a new case from being added on a particular day or before the start of the weekend. Additionally, some police stations are located far from court, which can also cause delays. SAPS mentioned that they have a process in place aimed at ensuring that arrested persons are brought before court as soon as possible. This entails carrying out internal inspections at police stations to identify and address any issues that may cause delays in taking suspects to court.[197]

175. In view of the above discussion, the Commission recommends that the DOJ&CD consider resuming the practice of holding court sessions over weekends to hear bail applications. The Commission is aware that this practice was not sustainable in the past due to its high costs. Therefore, it is crucial to consult all relevant role players to determine the most practical and cost-effective manner to hold court sessions over weekends. The Commission believes that the lack of resources cannot justify violating the constitutional rights of accused persons.

176. It is important to note that there is no issue with the wording of section 50(1)(c) as it clearly states what a police official is allowed and not allowed to do. Hence, the problem that is being experienced in practice is due to the incorrect interpretation and implementation of this section. The Commission believes that problems with implementation should not be resolved through legislative changes to the law but should be addressed by ensuring that the existing provisions are correctly interpreted and implemented.

3 Legal representation

177. Legal Aid South Africa suggested that the State should ensure an accused person is provided with legal representation at the time of arrest before his or her first appearance in court. They have also emphasised the importance of allocating additional financial and human resources to Legal Aid SA to assist accused persons upon their arrest.

197 Meeting held with Legal Support (Policing and Detection Division) on 26 February 2024.

178. The Commission supports Legal Aid South Africa's proposal. However, the Commission would like to point out that section 73 of the CPA already provides that accused persons are entitled to legal representation from the time of their arrest. However, it came to the Commission's attention that arrested individuals are not provided with legal representation before their first court appearance, indicating that this provision is not being effectively implemented in practice.[198] Hence, the Commission recommends that section 39 of the CPA should be amended to require a police official who makes an arrest to inform the suspect that he or she may apply for legal representation as provided for in section 73 of the CPA and assist the suspect in contacting the local office of Legal Aid South Africa.

4 Modernisation

179. The NPA submitted that although reporting cases to the SAPS digitally may not happen anytime soon, the e-natis system provides for the digital reporting of minor accidents. They advised that police stations should have a system in place for complainants to register complaints using a computer provided for that purpose. Furthermore, the charge office staff or detectives should assist users in this process.

180. It is worth noting that the SAPS still relies on paper-based processes. However, the SAPS submitted that the modernisation of their processes should be delayed until they can address it internally first since not all police stations are equally prepared to handle the transition to a digital system. This prompts the question of whether the new CPA should include an empowering provision for the modernisation of the SAPS's paper-based processes in a broad sense without encumbering the Bill with specifics to permit implementation as and when resources permit.

Question

Considering the existing resource constraints, how should the processes of the SAPS be modernised and digitised to enhance operational efficiency and improve service delivery to the public?

198 Input provided by Professor L Munting, an advisory committee member for the CPR Project, on 2 February 2024.

LIST OF SOURCES

Table of cases

1. *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A)
2. *Ex parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 (4) SA 613 (CC)
3. *George Mangaliso Maduna vs Minister of Justice and Correctional Services; Minister of Police*, Case No: 23323/02.
4. *Goliath v Minister of Police* (CA107/2017) [2017] ZAECGHC 119
5. *Govender v Minister of Safety and Security* 2001 2 SACR 197 (SCA)
6. *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (T)
7. *Mashilo and Another v Prinsloo* 2013 (2) SACR 648 (SCA)
8. *Minister of Defence v Potsane* 2002 (1) SA 1 (CC)
9. *Minister of Safety and Security v Kleinhans* 2014(1) SACR 613 (WCC)
10. *Minister of Safety and Security v Sekhoto* 2011 (1) SACR 315 (SCA)
12. *Rex v Jones* 1952 (1) SA 327 (E)
13. *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1
14. *S v Walters* 2002 2 SACR 105 (CC)
15. *Smit v Minister of Justice and Correctional Services and Others* [2020] ZACC 29
16. *The Sex worker Education and Advocacy Taskforce v Minister of Safety and Security and Others* (3378/07) [2009] ZAWCHC 64; 2009 (6) SA 513 (WCC)

Table of legislation

South Africa

Statutes

1. Animal Health Act, 7 of 2002
2. Border Management Authority Act, 2 of 2020
3. Child Justice Act, 75 of 2008
4. Civil Aviation Act, 13 of 2009
5. Constitution of the Republic of South Africa, 1996
6. Consumer Protection Act, 68 of 2008
7. Criminal Procedure Act 51 of 1977
8. Criminal Procedure Act, 56 of 1955
9. Criminal Procedure Amendment Act, 9 of 2012
10. Defence Force Act, 42 of 2002
11. Drugs and Drug Trafficking Act, 140 of 1992
12. Electronic Communications Act, 36 of 2005
13. Electronic Communications and Transactions Act, 25 of 2002
14. Firearms Control Act, 60 of 2000
15. Game Theft Act, 105 of 1991
16. Immigration Act, 13 of 2002
17. Judicial Matters Second Amendment Act, 4 of 1998
18. Limpopo Gambling Act, 3 of 2013
19. Magistrates' Courts Act, 32 of 1944.
20. Mineral and Petroleum Resources Development Act, 28 of 2002
21. National Environmental Management: Protected Areas Act, 57 of 2003
22. National Prosecuting Authority Act, 32 of 1998
23. Private Security Industry Regulation Act, 56 of 2001
24. Property Practitioners Act, 22 of 2019
25. Protection of Personal Information Act, 4 of 2013
26. Sheriffs Act 90 of 1986.
27. South African Police Service Act, 68 of 1995

Bills

1. Criminal Procedure Amendment Bill [B39B-2010]
2. Military Discipline Bill [B21-2019]

Rules

1. Rule 54(4) of the Uniform Rules of Court.
2. Rule 54(6)-(8) of the Uniform Rules of Court.
3. Rule 64 of the Magistrates' Courts Rules

Government Notices

1. GN 4115 in GG 49772 of 27 November 2023
2. GN R2828 in GG 47634 of 2 December 2022
3. GN 2346 in GG 47197 of 5 August 2022
4. GN R499 in GG 42338 of 29 March 2019
5. GN 1114 in GG 41982 of 19 October 2018
6. GN R1147 in GG 40294 of 23 September 2016
7. GN 780 in GG 38080 of 10 October 2014
8. GN R691 in GG 37968 of 2 September 2014
9. GN R692 in GG 37968 of 2 September 2014
10. GN R62 in GG 36111 of 30 January 2013
11. GN 275 in GG 30856 of 7 March 2008
12. GN R209 in GG 23143 of 19 February 2002
13. GN No. R.210 of 19 February 2002.

Foreign legislation

1. Administration of Criminal Justice Act 2015 (Nigeria)
2. Criminal Procedure and Evidence Code (Malawi)
3. First Schedule of the Criminal Procedure Code (Singapore)
4. Police and Criminal Evidence Act of 1984 (United Kingdom)

Bibliography

1. African Charter on Human and Peoples' Rights (01 June 1981)
2. Arusha Gopaul "The powers of a peace officer to arrest a suspect without a warrant, detain and use force – its constitutionality and consequences on the rights of a suspect" March 2022 (Thesis for the degree Doctor of Laws, UNISA).
3. Botha R & Visser J "Forceful arrests: an overview of section 49 of the criminal procedure act 51 of 1971 and its recent amendments" (2012) 15:2 *PELJ PER*
4. Correctional Services Annual Report 2022/2023
5. Dangerous weapon Definition: 703 Samples | Law Insider
6. DOJ&CD's Annual Report 2022/2023
7. Du Toit et al *Commentary on the Criminal Procedure Act* (Juta loose-leaf RS 65 2020)
8. Hiemstra *Hiemstra's Criminal Procedure* (Lexis Nexis loose-leaf February 2023)
9. https://allqs.saqa.org.za/showUnitStandard. php?id=377224
10. https://www.prisonstudies.org/highest-to-lowest/pre-trial detainees?field_region_taxonomy_tid=15
11. Independent Police Investigative Directorate's Annual Report 2022/2023
12. Institute for Security Studies "Global lessons on regulating private security" 2016 (Global lessons on regulating private security - ISS Africa).
13. International Covenant on Civil and Political Rights (16 December 1966)
14. Jean Redpath "Lesufi's appointment of 6,000 'crime wardens' is deeply concerning for the rule of law" *Daily Maverick* 22 July 2024.
15. Kole J "Exploring questions of power Peace officers and private security" *SA Crime Quarterly* No.61 September 2017
16. Le Roux-Kemp and Horne "An analysis of the wording, interpretation and development of the provisions dealing with the use of lethal force in effecting an arrest in South African Criminal Procedure" 2011 *SACJ* 266.
17. Lexis Nexis "When can you make a Citizen's Arrest?" 13 August 2021.
18. National Development Plan (Vision 2030)
19. National Instruction 11 of 2019 on Arrest, Treatment and Transportation of an Arrested Person.
20. NPA's Annual Report 2022/2023
21. Phillip Burring P., Reddi M "Section 49, lethal force and lessons from the De Menezes shooting in the United Kingdom" *De Jure* (2013) 933.

22. Professional Use of Force Policy and Guidelines for the South African Police Service of 2018
23. Sami-Kistnan “A critical analysis of section 49 of the Criminal Procedure Act 51 of 1977 – ‘The shoot to kill debate’” (LLM Dissertation University of Pretoria, 2011).
24. SAPS’s Annual Report 2022/2023
25. The Khampepe Commission of Inquiry Report (February 2006)
26. Tshehla B “Police officers’ discretion and its (in)adequacy as a safety valve against unnecessary arrest” (2021) 46:2 *Journal for Juridical Science* 80.
27. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984)
28. Universal Declaration of Human Rights (10 December 1948)
29. Van der Walt T. "The Use of Force in Effecting Arrest in South Africa and the 2010 Bill: a Step in the Right Direction" *PELJ PER* 2011(14) 138